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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the standing of the Director of the Office of Workers' Compensation Programs in the United States Department of Labor, to petition the court of appeals for review of a decision of the Benefits Review Board under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c), is limited to issues that affect the Director's pecuniary interest or disrupt a specific administrative function.

PARTIES TO THE PROCEEDINGS

Jackie Harcum was the claimant in the proceeding below where the employer, Newport News Shipbuilding and Dry Dock Company, was the respondent and the Director of the Office of Workers' Compensation Programs in the United States Department of Labor was the petitioner.

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v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs in the Department of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 8 F.3d 175. The decision of the Benefits Review Board (App., *infra*, 27a-36a) is unreported. The decision of the administrative law judge (App., *infra*, 37a-62a) is reported at 23 Ben. Rev. Bd. Serv. 515.

JURISDICTION

The court of appeals entered its judgment on October 29, 1993, and denied a petition for rehearing on January 7, 1994. App., *infra*, 25a-26a. On March 28, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921(b), 921(c), 921(d), 921a, 939(a), 939(c)) are reprinted at App., *infra*, 63a-66a. Pertinent provisions of the Department of Labor's regulations (20 C.F.R. 701.201, 701.202, 702.333, 801.102, 802.410) are reprinted at App., *infra*, 67a-68a.

STATEMENT

This case concerns the standing of the Director of the Office of Workers' Compensation Programs in the Department of Labor to petition the court of appeals to review a decision of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*

1. The LHWCA creates a comprehensive federal scheme to compensate workers injured or killed while employed upon the navigable waters of the United States. Congress directed the Secretary of Labor to "administer the provisions" of the Act and authorized him to issue "rules and regulations" necessary to the Act's administration. 33 U.S.C. 939(a). Congress also specifically provided that the Secretary shall actively supervise the medical care rendered to injured employees, 33 U.S.C. 907; approve

settlements, 33 U.S.C. 908(i); appear before courts of appeals through attorneys appointed to represent him, 33 U.S.C. 921a; bring actions in district court to enforce compensation awards, 33 U.S.C. 921(d); furnish information to claimants, assist them in obtaining medical and rehabilitation services, and, upon request, provide legal assistance in processing a claim, 33 U.S.C. 939(c); administer a Special Fund for payment of benefits in specified circumstances, 33 U.S.C. 944; and issue and enforce rules and regulations pertaining to employee safety, 33 U.S.C. 941. The Secretary has delegated most of his responsibilities under the LHWCA to the Director of the Office of Workers' Compensation Programs (Director). 20 C.F.R. 701.201, 701.202; see 55 Fed. Reg. 9033 (1990) (Secretary of Labor's delegation of some safety and health responsibilities to Assistant Secretary for Occupational Safety and Health).

Workers seeking compensation under the Act must file a claim with one of the local district directors (referred to in the LHWCA as "deputy commissioners") in the Office of Workers' Compensation Programs (OWCP), who carry out the day-to-day administration of the Act. 33 U.S.C. 913(a), 939(a) and (b); 20 C.F.R. 701.201-701.203, 701.301(a)(7). The district director conducts such investigation of the claim as he deems necessary and, if able to resolve the claim informally, is authorized to issue a compensation order; if he is unable to resolve the claim informally, it is forwarded for hearing to an administrative law judge (ALJ), who is then empowered to issue a compensation order. 33 U.S.C. 919(c), (d) and (e); 20 C.F.R. 702.301-702.317, 702.348-702.349. Implementing regulations provide that the claimant and the employer (or its insurance carrier) are necessary parties for a hearing, 20 C.F.R. 702.333(a), and that the Solicitor of Labor, or his

designee may participate on behalf of the Director, as an "interested party." 20 C.F.R. 702.333(b).

An ALJ's decision is reviewable by the Benefits Review Board (Board) whose members are appointed by the Secretary. 33 U.S.C. 921(b)(1). The Board reviews the ALJ's decision to determine if it is supported by substantial evidence and is in accordance with law. 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102; see generally *Kalaris* v. *Donovan*, 697 F.2d 376, 382 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). Any "party in interest" may file an appeal from the ALJ to the Board. 33 U.S.C. 921(b)(3). The term "party in interest" is defined by regulation to mean "the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. 801.2(a)(10); see also 20 C.F.R. 802.201(a)(1).

The Board's decision is reviewable by the court of appeals. Under Section 21(c) of the LHWCA, any "person adversely affected or aggrieved" may petition the court of appeals for such judicial review. 33 U.S.C. 921(c). The Secretary's regulations provide that the Director, as the designee of the Secretary "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA [33 U.S.C. 921(c), i.e., in the court of appeals]." 20 C.F.R. 802.410(b).[1]

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[1] The procedures for adjudication of claims reflect substantial modifications made by the 1972 amendments to the LHWCA. See Pub. L. No. 92-576, 86 Stat. 1251. Before those amendments, OWCP deputy commissioners conducted hearings and issued compensation orders in disputed cases. Those decisions were reviewable in an injunctive action against the deputy commissioner in district court, subject to further review by appeal to the court of appeals under 28 U.S.C. 1291. See *Kalaris*, 697 F.2d at 381-382. The 1972 amendments transferred the deputy commissioners' hearing authority to ALJs and replaced the district court injunctive proceedings with appeals to the Board, whose decisions are subject to review by the court of appeals under 33 U.S.C. 921(c). Under the new regime, "[t]he Board * * * performs a review function identical to that which the [d]istrict [c]ourts performed" before the 1972 amendments. *Kalaris*, 697 F.2d at 382. As a purely adjudicatory body, the Board, like a district court, does not participate as a party in appeals from its decisions. See 42 Fed. Reg. 16,133 (1977) (notice accompanying promulgation of 20 C.F.R. 802.410 stating that "[a]s a quasi-judicial body the Board does not participate in any court proceedings challenging the validity of its decisions").

2. Jackie Harcum, an employee of Newport News Shipbuilding and Dry Dock Co. (Newport News), suffered a work-related, disabling back injury and filed a claim for benefits under the LHWCA. App., *infra*, 2a. The claim was referred to an ALJ to resolve several disputed issues, including whether claimant Harcum was entitled to benefits for temporary total disability (not merely partial disability) from the date that he stopped work at the shipyard (May 6, 1988) until the date he found alternative employment (February 16, 1989). *Id.* at 6a, 39a.[2]

[2] Newport News also asserted that the claimant suffered from a preexisting permanent partial disability that contributed to his current disability, and that Newport News was entitled to a reduction in the amount of benefits it was required to pay because the Special Fund administered by the Secretary should assume payment for part of the benefits under Section 8(f) of the Act. App., *infra*, 7a. See 33 U.S.C. 908(f) (Special Fund assumes liability for compensation payment for injury after 104 weeks of permanent disability if claimant had preexisting permanent partial disability that combined with his compensable injury to render him more disabled than he would have been from the injury alone); 33 U.S.C. 944(a). The ALJ and the Board agreed with Newport News that Section 8(f) applied to this case. App., *infra*, 7a, 33a-36a, 59a-61a. The court of appeals, however, rejected both parties' interpretations of Section 8(f), reversed the Board's ruling and remanded the case for further proceedings. App., *infra*, 14a-24a. Newport News filed a petition for rehearing and suggestion

The ALJ applied the rationale of the Board's decision in *Stevens* v. *Lockheed Shipbuilding Co.*, 22 Ben. Rev. Bd. Serv. (MB) 155 (1989) (total disability becomes partial when claimant regains residual wage-earning capacity and it relates back to date of maximum medical improvement). The ALJ reasoned that the claimant was entitled only to permanent partial (rather than temporary total) disability benefits as of May 6, 1988, because that was the date he left employment at Newport News and because the date of his maximum medical improvement had already passed. App., *infra,* 6a, 56a-57a. The ALJ held that the claimant regained residual wage-earning capacity as of May 6, 1988, and that he therefore should have received compensation after that date based only on a permanent partial disability. *Id.* at 57a.

The Director appealed the ALJ's ruling to the Board as a "party in interest," pursuant to 33 U.S.C. 921(b)(3). App., *infra,* 7a. The Director contended that the claimant was entitled to benefits based on permanent total disability until February 16, 1989, when he secured other employment. The claimant responded in support of the Director's argument and Newport News responded in support of affirmance. *Id.* at 29a.

The Board affirmed the ALJ's ruling, although it clarified the underlying rationale. The Board vacated the ALJ's reliance on its *Stevens* decision because the decision had subsequently been reversed on judicial review. App., *infra,* 29a-31a; *Stevens* v. *Director, OWCP,* 909 F.2d 1256 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991). The Board affirmed, however, on the alternative rationale that

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of rehearing en banc on the Section 8(f) issue, which the court of appeals denied. App., *infra,* 25a-26a. Although the Director disagrees with the court's Section 8(f) ruling, she does not believe that review of that issue by this Court is warranted.

Newport News' uncontradicted evidence showed that there was suitable alternate employment for the claimant as of May 1988, and that the claimant had not shown that he was unable to obtain such employment. App., *infra,* 31a-33a. The Board also ruled that a statement by Newport News to the claimant that it would determine whether it had a light-duty position available for him, and its subsequent hiring of a vocational consultant to assist the claimant in securing alternate employment, did not affect that finding, because Newport News was not under any obligation to rehire claimant or to find him an actual job offer. *Id.* at 32a-33a. The Board therefore concluded that the claimant was only partially disabled as of May 1988.

3. The Director filed a petition in the court of appeals for review of the Board's decision pursuant to 33 U.S.C. 921(c). The claimant did not file a petition for review. In response to an inquiry from the court of appeals (following the Director's motion to amend the case caption and Newport News' statement that it did not object), the claimant stated that he had not appealed, but that the Director could pursue the case as she chose. See Attachments A and B to Respondent's Answer to Petitioner's Petition for Rehearing. The court of appeals granted the Director's motion and amended the caption to show Harcum as a claimant in the proceedings below.

The Director challenged the Board's holding as to suitable alternative employment, contending that the Board usurped the ALJ's fact-finding role. The Director also contended that, even if the employer made a showing of suitable alternative employment, the claimant had legitimately relied on the employer's vocational rehabilitation program, rather than independently seeking work, during the period in question. Thus, the Director argued that the Board's decision erroneously denied total disability bene-

fits for the period between May 1988 and February 1989. App., *infra,* 2a.

Although the issue of standing was not raised or briefed by the parties, the court of appeals held that the Director did not have standing to petition for review of the Board's ruling as to the onset date of claimant's partial disability. App., *infra,* 9a n.1, 13a-14a. The LHWCA provides in relevant part that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order" in the court of appeals. 33 U.S.C. 921(c). The court concluded that 33 U.S.C. 921(c) "codifies the constitutional requirement that limits standing to those persons who can allege 'that they personally have suffered or imminently will suffer an injury.' " App., *infra,* 9a n.1 (quoting E. Chemerinsky, *Federal Jurisdiction* § 2.3.2, at 52 (1989)). In the court's view, the Director suffers such an injury only when a Board decision "alter[s] the Director's ability to carry out his or her responsibilities under the LHWCA or to protect the fiscal integrity of the special fund." App., *infra,* 14a.

In holding that the Director lacks standing, the court of appeals relied upon *Director, OWCP* v. *Donzi Marine, Inc.,* 586 F.2d 377 (5th Cir. 1978). App., *infra,* 10a-12a. The court explained that in *Donzi Marine,* the Fifth Circuit held that the Director "would have standing only if an interest of the Director arising from his or her specifically delegated responsibilities was adversely affected by the Board's decision." App., *infra,* 10a. The court below indicated that, under the *Donzi Marine* rationale, the Director "may redress Board decisions that adversely affect the Director's legitimate administrative interests. * * * For example, if a Board decision substantially augmented the nature of the administrative duties delegated to the Director, increased the Director's necessary expenditure of administrative resources, or created confusion as to how the

Director was to carry out specific functions, the Director's responsibilities under the LHWCA would be bound up sufficiently with the merits of the appeal to evidence a cognizable administrative injury." App., *infra,* 11a, citing *Donzi Marine,* 586 F.2d at 381-382.

The court of appeals noted that it had adopted the logic of *Donzi Marine* in *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co. (Langley),* 676 F.2d 110 (4th Cir. 1982), where it had questioned whether "the Board's decision sufficiently implicated an administrative or economic interest of the Director so as to give rise to a redressable injury." App., *infra,* 13a. The court treated its decision in *Langley* as holding that the Director had standing because of his interest in protecting the fiscal integrity of the Special Fund. App., *infra,* 13a, citing 676 F.2d at 114.[3]

Applying the foregoing analysis to this case, the court concluded that the Director had standing to seek review of the portions of the Board's decision that would result in increased payments from the Special Fund administered by the Director (see note 2, *supra*), but did not have standing to appeal the issue of the onset date of the claimant's partial disability. The court reasoned that although the Director contended that the Board misapprehended the LHWCA's requirements, the Board's conclusion as to when claimant's disability became partial neither altered the Director's ability to carry out her responsibilities under the LHWCA nor affected the fiscal integrity of the Special Fund. App., *infra,* 13a-14a.[4]

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[3] The court below also noted its own prior holding that the Director is not a proper respondent to a petition for review under 33 U.S.C. 921(c). App., *infra,* 12a n.2 (citing *I.T.O. Corp.* v. *Benefits Review Bd.,* 563 F.2d 646, 648 (4th Cir. 1977) (en banc)), discussed at note 6, *infra.*

[4] The court denied the Director's petition for rehearing and suggestion of rehearing en banc on the standing issue. Two judges voted to rehear the case en banc. App., *infra,* 25a-26a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Director does not have standing to petition the court of appeals for review of a ruling by the Benefits Review Board unless the Director has a pecuniary interest or the Board's ruling will disrupt the Director's performance of specific administrative functions. The court of appeals failed to recognize that the Director is "aggrieved or adversely affected" by the Board's ruling in the instant case, and thus has standing to appeal, due to the interests created by Congress in the Secretary and the Director in their broad authority to administer the LHWCA and to participate in the claims adjudication process. This Court specifically noted, but left unresolved, the issue of the Director's standing in *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 (1983), and that issue continues to divide the courts of appeals. Review by this Court therefore is warranted.

1. Although the decision below is in accord with decisions of the Second Circuit and Fifth Circuit,[5] it conflicts with decisions of the D.C. Circuit. In *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972 (1979), cert. denied, 448 U.S. 907 (1980), the D.C. Circuit held that the Director "has standing as a petitioner in this proceeding

[5] See *Fusco* v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded on other grounds, 444 U.S. 1028, reinstated on remand, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Donzi Marine, Inc.*, 586 F.2d at 382. *Fusco* and *Donzi Marine* hold that the Director lacks statutory standing under 33 U.S.C. 921(c) to appeal Board orders denying compensation claims. *Fusco*, 601 F.2d at 670, 622 F.2d at 1113; *Donzi Marine*, 586 F.2d at 382. Neither *Fusco* nor *Donzi Marine* addressed whether the Director would have standing under Article III if she was statutorily authorized to seek review. *Fusco*, 601 F.2d at 670; *Donzi Marine*, 586 F.2d at 378 n.2.

both because of his official responsibility for administration of the LHWCA and because of his financial interest as administrator of the special fund." 613 F.2d at 977 n.6. The D.C. Circuit reinforced that ruling in *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (1982), where it explained that it had "previously held that the Director's general supervisory and enforcement interest, apart from any pecuniary interest, is sufficient to convey upon the Director standing to file a petition for review under section 921(c)." 673 F.2d at 483.[6] The Fourth Circuit in *Langley*

[6] *Shahady* specifically involved the question whether the Director is a proper respondent in proceedings before the court of appeals. The D.C. Circuit held that "[b]ecause the statutory scheme of the LHWCA and regulations promulgated thereunder clearly contemplate that the Secretary or his delegate shall participate as a matter of course in section 921(c) review proceedings, we hold the Director should be named a party-respondent in all review proceedings brought under section 921(c), whether or not the Director supports the Board's order." 673 F.2d at 480. Other courts of appeals have agreed with *Shahady* that the Director is a proper respondent under the Act. See *Goldsmith* v. *Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *Thornton* v. *Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984); *Ingalls Shipbuilding Div., Etc.* v. *White*, 681 F.2d 275, 286-287 (5th Cir. 1982), overruled on other grounds by *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); see also *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988). But see *I.T.O. Corp.* v. *Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (en banc), reinstating in pertinent part, 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded, 433 U.S. 904 (1977) (Director limited to intervention under Fed. R. Civ. P. 24). Some of the decisions upholding the Director's status as respondent are based on 33 U.S.C. 921(c) and some are based solely on Fed. R. App. P. 15(a), which provides that petitions for review of administrative agency orders must name the agency as a respondent. *Brown & Root, Inc.*, 707 F.2d at 154; *Ingalls Shipbuilding*, 681 F.2d at 282-284.

understood *National Van Lines* as holding that the Director "has standing to appeal because of his general administrative responsibility and his financial interest in the special fund." 676 F.2d at 113. And in the instant case, the Fourth Circuit specifically recognized that its ruling is inconsistent with *Shahady*. See App., *infra*, 12a.[7]

The Third Circuit has indicated its approval of *Shahady*, as "sound on policy because the Director's supervisory and enforcement interest should be sufficient to entitle him to participate as a party; his responsibility to oversee the development of a consistent body of law in this area should not depend upon the vagaries of the parties' private, albeit adversary, interests." *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (1988). The Third Circuit did not decide the issue in *Curtis* because the employer and employee were both parties before that court. In an earlier case under the Black Lung Benefits Act which incorporates the same judicial review process as under the LHWCA, however, the Third Circuit noted that the Director had standing to petition the court of appeals for review of a Board ruling even though the Director lacked a pecuniary interest in the litigation. The court explained that it concurred "in the Director's view

[7] Although *Shahady* presented the question of whether the Director may appear as *respondent* when a private party has petitioned for review of a Benefits Review Board decision, its holding that the Director is an automatic respondent in review proceedings is based not on Fed. R. App. P. 15(a), but rather on *National Van Lines*, which held that the Director has standing as a *petitioner* and which *Shahady* interpreted as holding that the Director's general interest in enforcement of the LHWCA is an independent basis for standing. 673 F.2d at 483. Thus, *Shahady* clearly establishes in the D.C. Circuit that the Director, based on her status as administrator of the Act, may appear as petitioner *or* respondent in proceedings under 33 U.S.C. 921(c). See *Kalaris* v. *Donovan*, 697 F.2d 376, 381 n.8 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983).

that he has standing because of his responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program." *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18-19 n.2 (3d Cir. 1982); see also *Director, OWCP* v. *O'Keefe*, 545 F.2d 337, 339 & n.7 (3d Cir. 1976) (assuming Director has authority under 33 U.S.C. 921(c) to petition court of appeals for review of Board decision).

Significantly, moreover, the Fifth Circuit itself appears to have retreated from the standard it set forth in *Donzi Marine*, on which the court below relied. In *Director, OWCP* v. *Bethlehem Steel Corp.*, 949 F.2d 185, 186-187 (1991), the Fifth Circuit held that the Director has statutory standing to challenge a Board ruling as to when a total disability becomes a partial disability—an issue that is, for present purposes, analytically indistinguishable from the one the Fourth Circuit held that the Director did *not* have standing to raise in this case. The Fifth Circuit reasoned that the Director was "faced by the ruling of three Courts of Appeals that the Board of Review is simply wrong," which "poses a major problem in the administration of an Act which was conceived out of the * * * constitutional demand for a nationwide uniformity." *Id.* at 187. The court pointed out that if the Director did not have standing to seek relief from the Board's ruling, "injured workers in the extensive maritime activities in the Fifth Circuit must endure a ruling fraught with substantial dollar loss." *Ibid.*[8] Thus, the Fifth Circuit standard appears to permit the court to substitute its judgment for the Director's judgment as to the impact that a Board decision has on the administration of the LHWCA, thereby leading to great unpredictability.

[8] The Fifth Circuit also noted that although the claimant had not filed his own petition for review of the Board's decision, the claimant had entered a formal appearance in the case and had adopted the Director's briefs and argument. 949 F.2d at 186.

In *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 (1983), this Court took note of the question whether the Director has statutory and Article III standing to file a petition for a writ of certiorari. The Court found it unnecessary to decide the question, however, because the employer in *Perini* conceded that the Director was a proper respondent before the court of appeals and, as such, was entitled to petition for a writ of certiorari under 28 U.S.C. 1254(1). 459 U.S. at 304. Moreover, the claimant in *Perini* participated before this Court and filed briefs in support of the Director thereby ensuring that the Court was presented with an admittedly justiciable controversy. *Id.* at 304-305. The Court noted that in some earlier cases, the Director had petitioned for writs of certiorari that were granted by the Court, but because of the procedural posture, resolution of the standing issue had been unnecessary in those cases as well. *Id.* at 303 n.11.[9] The Court should now resolve the standing issue that it has left open and that continues to divide the lower courts.

2. a. The panel's holding that the Director does not have standing to petition the court of appeals for review of the Board's ruling on the partial disability issue is incorrect. There is an ongoing dispute in this case as to the proper amount of benefits that the claimant should be

[9] The Court also pointed out that the courts of appeals that had rejected the Director's standing argument in *Fusco, Donzi Marine*, and *I.T.O. Corp.*, had relied on statutory grounds and did not address the Article III standing issue. 459 U.S. at 302 n.9. The Court concluded in the *Perini* case that "the Director has statutory authority to seek review in this Court," but that the Director "*may* not have Art. III standing to argue the merits of [claimant's] claim because the Director's presence does not guarantee the existence of a justiciable controversy with respect to the merits of [claimant's] coverage under the LHWCA." 459 U.S. at 304.

awarded. And "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' * * * is one within the power of Congress to determine." *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968)).

Congress thus may determine whether an interest is "legally-protected," see *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), such that an invasion of that interest results in an "injury in fact" for standing purposes. In this case, Congress has vested the Secretary of Labor with authority to promulgate regulations to aid in his administration of the LHWCA (33 U.S.C. 939(a)); those regulations grant the Director standing to participate at all levels, administrative and judicial, of a LHWCA dispute. *Shahady*, 673 F.2d at 483. The regulations specifically provide that the Director, as the designated official "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings" in the courts of appeals. 20 C.F.R. 802.410(b).[10]

In holding that the Director nevertheless lacks Article III standing, the court of appeals failed to recognize the extensive duties conferred on the Director (through the Secretary) by Congress and the attendant interests the Secretary and Director are entitled to advance. As noted above, Congress has vested the Secretary of Labor with the following duties: "administer[ing] the provisions" of the Act and issuing necessary "rules and regulations," 33 U.S.C. 939(a); actively supervising the medical care

[10] The regulations also make clear that the Director has standing to participate in administrative proceedings, including by appealing to the Board from an ALJ decision with which she disagrees. 20 C.F.R. 702.333(b), 801.2(a)(10), 802.201(a)(1).

rendered to injured employees, including maintaining a list of health care providers not authorized to render services under the LHWCA and regulating the medical expenses, 33 U.S.C. 907; approving settlements, 33 U.S.C. 908(i); appearing before courts of appeals through attorneys appointed to represent him, 33 U.S.C. 921a; bringing actions (through deputy commissioners) in district court to enforce compensation awards, 33 U.S.C. 921(d); furnishing information to claimants, assisting them in obtaining medical and rehabilitation services, and, upon request, providing them with legal assistance in processing a claim, 33 U.S.C. 939(c); administering a Special Fund for payment of benefits in specified circumstances, 33 U.S.C. 944; and issuing and enforcing rules and regulations pertaining to employee safety, 33 U.S.C. 941.

In sum, the Secretary is charged with ensuring that employers fulfill their statutory responsibility to pay valid claims (thereby relieving the claimant and the public at large of that cost), assisting claimants in both administrative hearings and the courts, and defending the special fund against invalid claims. Cf. *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 641-648 (6th Cir. 1977) (discussing Secretary's analogous duties under Black Lung Benefits Act). The Secretary's role in ensuring payment by employers and assisting claimants not only serves the interest in "meeting the needs of the injured employee and his family," but also "by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). This statutory assignment of authority to the Secretary and, by delegation, to the Director, gives the Director standing to petition for review of Board decisions that she believes are erroneous.

b. The history of the LHWCA strongly supports the conclusion that the Director is "adversely affected or aggrieved" by Board orders that incorrectly reject a claim for benefits under the Act. Prior to the 1972 Amendments to the Act (see note 1, *supra*), the deputy commissioners (field administrators under the authority of the Director's predecessor) conducted hearings on claims, and their decisions were subject to review in injunctive proceedings in district court. The deputy commissioner was denominated as a respondent in such district court proceedings, see former Section 21(b), 44 Stat. 1436 (1927) (codified at 33 U.S.C. 921(b) (1970)), and it was clear that the deputy commissioner had standing to appeal under 28 U.S.C. 1291 from a district court ruling enjoining his decision, even in the absence of an appeal by another party. See *Henderson* v. *Glens Falls Indem. Co.*, 134 F.2d 320 (5th Cir.), cert. denied, 319 U.S. 756 (1943).

The 1972 Amendments transferred the authority to conduct hearings to ALJs and replaced district court injunctive actions with review by the Board, subject to review in the court of appeals. There is no indication, however, that those changes were intended to divest the LHWCA's administrator of authority to seek review in the courts of appeals of decisions on benefits claims that are adverse to her position. Cf. *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 649 (6th Cir. 1977) ("[w]e do not find in the [1972 Amendments] any Congressional intention * * * to compel the Secretary or his duly designated representative to accept [Board decisions] without recourse to the courts when he conscientiously disagrees"); *Shahady*, 673 F.2d at 485. Indeed, such a restrictive interpretation of 33 U.S.C. 921(c) would thwart the Director's policymaking, administrative and protective roles under the LHWCA, and would be directly at odds with a major purpose of the 1972

Amendments, which was to augment these roles. See S. Rep. No. 1125, 92d Cong., 2d Sess. 13-14 (1972) (placing responsibility for hearings with ALJs will better enable deputy commissioners to perform their administrative responsibilities under the Act); see generally *id.* at 14-15 (ensuring Director's active involvement at all stages of claim-processing under LHWCA); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12-13 (1972) (same).

That the Director's interest in the resolution of benefit claims is sufficient to confer standing is confirmed by the text and legislative history of the Black Lung Benefits Act, as amended in 1977, Pub. L. No. 95-239, 92 Stat. 95 (BLBA). The BLBA generally incorporates the procedures of the LHWCA, 30 U.S.C. 932(a), and explicitly provides that "[t]he Secretary shall be a party in any proceeding relative to a claim" for black lung benefits. 30 U.S.C. 932(k). The Senate Committee on Human Resources (the successor to the Committee on Labor and Public Welfare that drafted the 1972 amendments to the LHWCA) explained that this provision reflects the intent that the Director have standing under both Acts:

> Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended Longshoremen's and Harbor Workers' Compensation Act *confers standing upon the Secretary of Labor or his designee to* appear, present evidence, *file appeals* or respond to appeals filed with respect to the litigation and appeal of claims. In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. *The Secretary's interest as the officer charged with the responsibility for carrying forth*

> *the intent of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee* of the Secretary who has the responsibility for the enforcement of the Act, *to actively participate in the adjudication of claims before* the Administrative Law Judge, Benefits Review Board, and *appropriate United States Courts.*

S. Rep. No. 209, 95th Cong., 1st Sess. 21-22 (1977) (emphases added). "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject," *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309 (1911); *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983). See also *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). That is especially so here. Congress specifically intended that the procedures for administrative and judicial review under the LHWCA and BLBA be the same. To recognize the Director's standing under one Act but not the other would be inconsistent with that intent and would introduce unwarranted complexity into the implementation of the statutory mandates.[11]

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[11] The Director, OWCP, administers both the LHWCA and the BLBA. 20 C.F.R. 701.202(a) and (f). As set forth above, a specific provision of the BLBA (30 U.S.C. 932(k)), as well as its legislative history establish that Congress intended to permit the Director to seek review of Board decisions on BLBA claims, even in the absence of a financial interest in the outcome. Nonetheless, the lower court's constitutional ruling could have implications for the BLBA, which incorporates 33 U.S.C. 921(c) from the LHWCA. Although several courts of appeals, even before the addition of 30 U.S.C. 932(k), recognized the Director's standing to petition for review of Board decisions on black lung claims, the courts gave at least some weight to the Director's interest in those cases in obtaining reimbursement from mine operators for benefits paid from the Black Lung Disability Trust Fund. See *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685, 689-690 (3d Cir. 1977); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1271-1272 (4th Cir. 1977); *Director, OWCP* v.

c. The court of appeals correctly viewed 33 U.S.C. 921(c) in this context as authorizing standing as broadly as is permitted by Article III of the Constitution. App., *infra*, 9a n.1; see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). In concluding that the Director lacks the "injury in fact" required for constitutional standing, however, the court of appeals confused the Director's interest in the resolution of LHWCA cases with the interests of private parties, whose standing to litigate the merits of a particular case depends upon an economic or other personal stake in the outcome of a controversy. See *Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962). "[T]he Director in this litigation is no private party required to show 'that *he* has suffered injury in fact' * * * [;] [t]he question in this case is whether or not the interest of the Department of Labor of the United States Government has been adversely affected or aggrieved." *Eastern Coal Corp.*, 561 F.2d at 646. Because the Director appears "not as a private individual in any sense, but as the authorized representative of the Department of Labor" who is entrusted with responsibility for the administration of the LHWCA, *ibid.*, her interest is analogous not to that of private parties, but rather to that of other government officials carrying out their public duties under particular statutes. See, *e.g.*, *United*

Alabama By-Products Corp., 560 F.2d 710, 717 (5th Cir. 1977); *Eastern Coal Corp.*, 561 F.2d at 646; *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 336-338 (7th Cir. 1977); see *Donzi Marine*, 586 F.2d at 380 (distinguishing black lung cases on ground that, unlike LHWCA case before the court, government had an interest in establishing its right to recover funds already disbursed). The Director may also, however, wish to petition for review of Board decisions in some BLBA cases in which the Director did not initially find eligibility on behalf of the claimant and interim benefits therefore have not been paid out of the Black Lung Disability Trust Fund. In those cases, the government would not have a pecuniary interest in the case.

States ex rel. Chapman v. *Federal Power Comm'n*, 345 U.S. 153, 155-156 (1953); *In re Debs*, 158 U.S. 564, 584-586 (1895); cf. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982) (State has parens patriae standing based on the health and well being of its residents in general).

The benefits scheme established by the LHWCA does far more than provide for adjudication and vindication of purely private rights. As a workers' compensation system, it has many of the elements of social insurance, and as such is designed to promote the public interest:

> [T]he entire [workers'] compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. * * * .

3 A. Larson, *The Law of Workmen's Compensation* § 82.41 (1993); 1 *id.* § 1.20 ("like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame"); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977) (LHWCA, as amended, is remedial legislation that "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results," quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)). The United States has an interest in ensuring that claimants receive the maximum benefits to which they are entitled under such protective legislation. See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12-13 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 15

(1972). It may advance that interest through its agent, the Director, in the courts of the United States. Compare, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 437- 444 (1912); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-474 (1976).[12]

Given her broad responsibilities and the public interest inhering in them, the Director has a material interest in the administration and application of the LHWCA beyond the narrow range that the court of appeals grudgingly acknowledged. The Director's interest, on behalf of the United States, is engaged every time she concludes that the Board has improperly denied a particular claim. *Shahady*, 673 F.2d at 483; cf. *Eastern Coal Corp.*, 561 F.2d at 645 (Director is "adversely affected or aggrieved" under 33 U.S.C. 921(c) "in that * * * he is seeking what he deems to be lawful administration of the [BLBA] and assisting

[12] Cf. *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) (when EEOC acts under Title VII of the Civil Rights Act of 1964, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc) (Secretary's interest in bringing enforcement action under Employee Retirement Income Security Act is based not only on his duty to protect individual beneficiaries of specific pension programs, but also on the public interest in protecting "the very integrity, heart and lifeline of the program itself."); *Donovan* v. *University of Tex. at El Paso*, 643 F.2d 1201, 1208 (5th Cir. 1981) (Secretary sues to protect the public interest under Fair Labor Standards Act); *United States* v. *Federal Maritime Comm'n*, 694 F.2d 793, 800-802 (D.C. Cir. 1982) (Federal Maritime Commission's order approving rate agreement between shippers interfered with Justice Department's responsibility to enforce antitrust laws, and that injury established that Justice Department was "party aggrieved" entitled to assert public interest under Shipping Act and seek judicial review of Commission order); *United States* v. *Federal Maritime Comm'n*, 655 F.2d 247, 251-252 (D.C. Cir. 1980).

claimants * * * whose awards of benefits have been vacated by the Benefits Review Board, as well as defending the regulations he is charged with administering").

According standing to the Director in these circumstances does not impugn any of the core concerns underlying Article III's "case or controversy" requirement. Here there is a concrete dispute as to the onset date of the claimant's permanent partial disability, the resolution of which will affect the amount of benefits awarded to the claimant. And the Director's presence advocating that a greater payment of benefits by the employer is required "assure[s] that the * * * questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also *Lujan*, 112 S. Ct. at 2136; *Trafficante*, 409 U.S. at 211; *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 112-115 (1979).

3. The court of appeals' ruling presents a serious obstacle to the Director's enforcement of the LHWCA. Under the court of appeals' narrow view of standing, the Director is left powerless to challenge erroneous Board rulings in many circumstances. Although the Act authorizes recovery of attorneys' fees by a prevailing claimant, 33 U.S.C. 928(a), because of the relatively modest amount of most awards, and the significant legal costs and risks associated with appellate review, an individual claimant may lack the incentive or ability to petition for review in a particular case in which his claim is meritorious and important legal issues are involved.

The decision below also undermines the Director's distinct policymaking role under the LHWCA. It is the Director's views on questions of statutory and regulatory interpretation, not the views of the Board, that are entitled to

deference from the courts. See *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983);[13] see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (Board is not a policymaking agency and its interpretations are not entitled to special deference from the courts); cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of BLBA is entitled to deference). Under the Fourth Circuit's ruling, the Director's ability to advance her expert views, and thereby maintain uniform administration of the LHWCA, would be substantially impaired. See, *e.g.*, *Director, OWCP* v. *Bethlehem Steel Corp.*, 949 F.2d 185, 187 (5th Cir. 1991) (LHWCA was conceived out of a "constitutional demand for a nationwide uniformity").

Finally, the test applied by the court below, which was drawn from the Fifth Circuit's decision in *Donzi Marine*, creates confusion over what constitutes injury to a "legitimate administrative interest" of the Director. Compare, *e.g.*, the Fifth Circuit's ruling in *Donzi Marine*, 586 F.2d at 381-382 (Director's legitimate administrative interests are not adversely affected by Board's legal ruling that recreational boat industry employees are not covered by LHWCA), with the Fifth Circuit's more recent decision in *Bethlehem Steel Corp.*, 949 F.2d at 186-187 (Director's

[13] But see *Sea-Land Service, Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *American Ship Bldg. Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (neither Board nor Director is entitled to special deference).

interest adversely affected by Board ruling concerning when a total disability becomes a partial disability, when three courts of appeals had already rejected Board's position). A more straightforward approach to standing in this context, fully justified under the terms of the LHWCA and fully in accord with the Constitution, would permit the Director to petition for review of any Board decision resolving a benefits controversy that she, as a party to proceedings before the Board, regards as erroneous. The D.C. Circuit has endorsed this approach to the Director's standing, and the Third Circuit has expressed its approval of that approach as well. See pages 10-13, *supra*. The Court should resolve this important and recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92-1864

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, RESPONDENT

v.

JACKIE H. HARCUM, CLAIMANT

On Petition for Review of an Order of
the Benefits Review Board
(90-1287)

Argued: February 5, 1993
Decided: October 29, 1993

Before: ERVIN, Chief Judge, NIENEYER, Circuit Judge, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

ERVIN, Chief Judge:

Jackie Harcum ("Claimant"), a former employee of Newport News Shipbuilding & Dry Company ("Newport News"), suffers from a work-related, disabling back injury. As an employee covered under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, the Claimant filed a request for compensation benefits, which was partially granted and denied. On appeal, the Director of the Office of Worker's Compensation Programs in the United States Department of Labor ("Director") challenges the Benefits Review Board ("Board") as to its construction of the LHWCA on two grounds. First, the Director asserts that the Board improperly determined that the Claimant's disability shifted from the status of temporary total disability to that of permanent partial disability on May 6, 1988. In addition, the Director challenges the Board's application of a provision of the LHWCA to lessen substantially Newport News's obligation to pay benefits and to shift responsibility for compensation to a special fund organized under the LHWCA. Because we believe the Director lacks standing to raise the first issue, we decline to address it. Finding, however, that the Board erred in implicating the special fund and that the Director is the proper party to redress improper use of the fund, we reverse the Board's decision to limit Newport News's obligation to pay benefits.

I

The Claimant worked for Newport News as a machine installer from February 26, 1963 until May 6, 1988. During his tenure with Newport News, the Claimant suffered a series of back injuries. According to his medical records, the Claimant sustained a lumbar strain on June 3, 1965,

and a more severe lumbosacral strain on February 8, 1966. At the time of this second injury, an x-ray of the Claimant's back revealed a sacral arch defect. The Claimant again experienced a lumbar strain on February 7, 1977, and was unable to work from February 27, 1977 through March 28, 1977 as a result.

After two more related injuries in 1981 and 1983, the Claimant's physician referred him to a neurosurgeon. The neurosurgeon diagnosed the Claimant with a herniated disc in the cervical spine area and performed a hemilaminectomy on January 24, 1984 to remove the disc. The Claimant responded well to the surgery and was able to return to work on March 5, 1984. On October 24, 1984, the Claimant suffered the injury that serves as the subject of this appeal. While bending down in the bilge area of a steam barge, the Claimant was struck in the lower back by a piece of falling grating. After a month of unabated leg and back pain, the Claimant returned to the neurosurgeon. Tests revealed another herniated disc, this time in the lumbar spine area, and on January 11, 1985, the neurosurgeon removed the disc. On March 15, 1985, additional surgery was performed to free a pinched nerve root and remove retained fragments of disc material.

After a protracted recovery, the Claimant returned to light-duty work at Newport News on October 4, 1985, but immediately experienced back pain and was "passed out" of service temporarily to recuperate. Newport News paid the Claimant benefits under the LHWCA for temporary total and temporary partial disability until the Claimant again returned to Newport News's light duty facility in April 1987. On November 4, 1987, the Claimant's neurosurgeon formulated restictions by which he could return to his regular department. The doctor rated the Claimant as having an eighteen-percent whole body impairment and restricted his lifting to thirty pounds. The Claimant also

was to alternate regularly between sitting and standing and to refrain from ladder climbing.

The Claimant returned to his regular department in January 1988, but was unable to perform the necessary tasks. Therefore, on May 6, 1988, the Claimant was passed out of the shipyard once again. Newport News officials informed the Claimant that they would look for another job for him in the shipyard within his restrictions. The Claimant suggests that, based upon this reassurance, he did not look for a job outside of the shipyard at the time he was passed out. In August 1988, however, Newport News's supervisor of employee relations at the shipyard arranged a meeting with the Claimant. At the meeting, the Claimant was told that the shipyard had no work to offer him within his restrictions and that he was being referred to a rehabilitation counselor.

The Claimant met with the rehabilitation counselor for the first time on September 20, 1988, and the two began developing a job placement and rehabilitation program for the Claimant. The Claimant then started his search for a new job. After following several leads supplied by the rehabilitation counselor, the Claimant was able to secure a job with the Hampton Sheet Metal Company ("Hampton Sheet Metal") on February 16, 1989. The Claimant still works at Hampton Sheet Metal in a job that is comfortably within his disability restrictions. At the time of the hearing on this matter before the Administrative Law Judge ("ALJ"), the Claimant was earning $5.00 per hour and working forty hours per week. Subsequent to the Claimant's employment by Hampton Sheet Metal, Newport News requested that the rehabilitation counselor conduct a labor survey of thhe available jobs for which the Claimant may have qualified during the period of May 6, 1988 to February 15, 1989. The completed survey listed eleven job possibilities.

The Claimant filed a request for compensation benefits under the LHWCA, and a hearing was held before an ALJ on October 20, 1989. In addition to the above facts, the parties presented medical opinions of three doctors. A doctor opined, at Newport New's behest, that

> [i]t is obvious the Mr. Harcum's current low back condition was not caused by any one injury. Rather, it is clear that Mr. Harcum's current low back condition is the result of cumulative and repeated lumbar injuries. Each injury aggravated Mr. Harcum's low back problems and made him more susceptible to further back injuries, and each injury increased the severity of the subsequent injuries. This clearly constitutes a pre-existing permanent partial disability, and a cautious employer would not have hired Mr. Harcum with this manifest condition.

Additionally, Mr. Harcum's cervical spine condition also substantally contributes to his current level of disability. As a result of shoulder injuries in 1981 and 1983, surgery was performed on Mr. Harcum's cervical spine. As I noted previously, this equates to a five percent (5%) whole body impairment. I agree with Dr. Peach's statement in his December 1, 1987 letter. Dr. Peach indicated that Mr. Harcum's level of whole body impairment is a result of two surgical procedures: the 1984 surgery on Mr. Harcum's cervical spine and the 1985 surgery on his lumbar spine. The cervical and lumbar injuries, and the surgery they necessitated, clearly combined to create a greater impairment than would otherwise have occurred. This condition was manifest in Mr. Harcum's clinical record, and a cautious employer would not have hired him with this condition

Dr. Peach, the Claimant's neurosurgeon, indicated, in a December 1, 1987 letter, that the Claimant's permanent partial disability was due in part to both surgical procedures involving the Claimant's cervical and lumbar spinal areas. Another doctor opined that "[i]t is clear that Mr. Harcum had a pre-existing partial impairment or disability that was materially increased by the second injury and disc herniation."

After disposing of two issues not raised on this appeal, the ALJ addressed whether the Claimant was entitled to a temporary total disability award from May 6, 1988 until February 16, 1989. Citing *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157-59 (1989), the ALJ established the date of maximum medical improvement as the onset of permanent partial disability. As the parties had stipulated that date to be December 7, 1987, several months before the Claimant was passeed out of the shipyard permanently, the ALJ determind that, for the purpose of benefit payments, permanent partial disability began when the Claimant was passed out or on May 6, 1988. Alternatively, the ALJ held that Newport News had shown successfully the availability of suitable alternate jobs that the Claimant was capable of performing from May 6, 1988 to February 15, 1989. Therefore, the Claimant's disability ceased to be a total disability on May 6, 1988, when the Claimant regained wage-earning capacity.

The ALJ concluded that, from May 6, 1988, the Claimant should have received compensation based on a permanent partial disability rather than a temporary total disability. Based on the improper classification, the Claimant had received $101.34 per week in excess benefits during the period from May 6, 1988 to February 16, 1989. The ALJ held that Newport News was entitled to a credit against future benefits payments owed to the Claimant in

the amount of $101.34 per week for approximately forty weeks, the period of the overpayment.

The ALJ addressed, as the final issue, whether Newport News was entitled to a reduction in the benefits it was required to pay the Claimant pursuant to section 8(f) of the LHWCA, 33 U.S.C. § 908(f). Section 8(f) limits an employer's responsibility to pay disability benefits to one hundred and four weeks if the employee's work-related injury was substantially exacerbated by a pre-existing permanent partial disability. *See id.* § 908(f)(1). Finding that Newport News had established each of the elements needed to enjoy section 8(f) relief, the ALJ limited Newport News's obligation to pay weekly benefits to the Claimant accordingly.

The Director appealed the ALJ's decision to the Benefits Review Board as a "party in interest" pursuant to 33 U.S.C. § 921(b)(3). On appeal, the Board affirmed the ALJ's decision in all respects, but with one clarification. The ALJ had relied, for its determination of the commencement of partial disability, on *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), which the Ninth Circuit court of appeals subsequently reversed. *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom. Lockheed Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 498 U.S. 1073 (1991). The Ninth Circuit court held that the date total disability becomes partial is the date on which the employer establishes that suitable alternate employment is available, not the date on which maximum medical improvement occurs. *Id.* at 1259-60. The Board vacated "the administrative law judge's reliance on the Board's decision in *Stevens* to commence Claimant's award of benefits for permanent partial disability on May 6, 1988." The Board

noted, however, that the ALJ alternatively held that May 6, 1988 was the proper date because Newport News had established job availability as of that date. On that basis, the Board affirmed the ALJ's decision.

The Director petitioned this court for review of the Board's decision pursuant to 33 U.S.C. § 921(c). The Director raises two issues on appeal: (1) whether the Board erred as a matter of law in accepting the ALJ's determination of the Claimant's injury status change from that of temporary total disability to that of permanent partial disability; and (2) whether, in determining Newport News's entitlement to section 8(f) relief, the Board applied the incorrect standard.

II

The ALJ is the only adjudicative body handling a benefits determination that may make factual findings. *See Lavino Shipping Co. v. Donovan,* 267 F.2d 59, 61-62 (3d Cir. 1959). Therefore, the Board's review of the ALJ's factual findings is limited by the statutory requirement that "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). We review the Board's decision for errors of law and to ascertain whether the Board adhered to its statutorily-mandated standard for reviewing the ALJ's factual findingss. *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 543 (4th Cir. 1988).

The Board's adjudicatory interpretation of the LHWCA is entitled to no special deference because the Board serves no policy-making role. *See Zapata Haynie Corp. v. Barnard,* 933 F.2d 256, 258 (4th Cir. 1991). The Director is charged with administration of the LHWCA; therefore, we should respect a reasonable interpretation of the

LHWCA by the Director. *See id.; Newport News Shipbuilding & Dry Dock Co. v. Howard,* 904 F.2d 206, 209 (4th Cir. 1990). We are guided by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984) when deciding whether to accept a reasonable interpretation of the LHWCA advocated by the Director. *Zapata,* 933 F.2d at 258; *Howard,* 904 F.2d at 208. Absent clear congressional intent as to the proper construction of the LHWCA, we must give deference to the Director's reasonable and permissible interpretation. *Zapata,* 933 F.2d at 259; *Howard,* 904 F.2d at 209.

Before reviewing the Board's determinations, however, we must address whether the Director has standing to petition this court for review of the issues raised.[1] The LHWCA permits "[a]ny person adversely affected or aggrieved by a final order of the Board [to] obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred." 33 U.S.C. § 921(c). Unlike the provision of the LHWCA permitting "any party in interest" to seek review before the Board, *id.* § 921(b)(3), section 921(c) requires that the appellant be a "person . . . aggrieved," *id.* § 921(c), or a party that has suffered an injury in fact, economic or otherwise. *See Director, Office of Workers' Compensation Progams v. Newport News Shipbuilding & Dry Dock Co.,* 676 F.2d

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[1] Although not raised by the parties, standing presents an issue of the very justiciability of the claims ~~persents~~ and strikes at the core of the constitutional limitations placed upon this court by Article III of the Constitution. In this case, the LHWCA codifies the constitutional requirement that limits standing to those person who can allege "that they personally have suffered or imminently will suffer an injury." Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.2, at 52 (1989); *see* 33 U.S.C. § 921(c). Before we can address the merits of the Director's appeal, we must determine whether this basic and nonwaivable mandate is met.

110, 113 (4th Cir. 1982). We must decide whether the issues raised on appeal represent an actual injury to the Director.

The Fifth Circuit court of appeals was the first circuit court to address the extent of the Director's standing to appeal pursuant to 33 U.S.C. § 921(c). *See Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978). In *Donzi Marine,* the Director questioned the extent to which the LHWCA applied to the employees of small boat builders, marine operators, and other firms in the recreational boating industry. *Id.* at 377. The court recognized that, before it could address the merits of the appeal, it must resolve "whether the Director, the sole petitioner, is 'adversely affected or aggrieved' by the Board's decision [not to award benefits] as required by section 921(c)." *Id.* at 379 (quoting 33 U.S.C. § 921(c)).

The *Donzi Marine* court began its analysis by outlining the responsibilities conferred upon the Director by the LHWCA. The court concluded that the Director would have standing only if an interest of the Director arising from his or her specifically delegated responsibilities was adversely affected by the Board's decision. *Id.* The LHWCA confers four responsibilities upon the Director: (1) the performance of an assortment of general administrative and supervisory responsibilities, *e.g.* 33 U.S.C. §§ 906(b)(3), 907, 914, 919, 923(b), 930, 932; (2) the provision of assistance to persons covered by the LHWCA in processing their claims and receiving compensation, *id.* § 939; (3) the promulgation and enfocement of safety rules and regulations, *id.* § 941; and (4) the duty to administer the special fund established for the payment of certain benefits, *id.* § 944. *See Donzi Marine,* 586 F.2d at 379-80.

The court suggested that the nature of the Director's responsibilities presented two avenues by which the Director might have standing to petition for appellate review. First, the Director may redress Board decisions that adversely affect the Director's legitimate administrative interests. *Id.* at 381. For example, if a Board decision substantially augmented the nature of the administrative duties delegated to the Director, increased the Director's necessary expediture of administrative resources, or created confusion as to how the Director was to carry out specific functions, the Director's responsibilities under the LHWCA would be bound up sufficiently with the merits of the appeal to evidence a cognizable administrative injury. *Id.* at 381-82.

In addition, the Director may seek review of a Board decision adversely impacting the special fund created to pay employees in certain instances in which the employer is relieved of that obligation. *Id.* at 380-81; *see* 33 U.S.C. § 944. If the Board's decision favors payment out of the fund as opposed to by the employer, the depletion of the fund represents an injury in fact to the Director as administrator of the fund.

The *Donzi Marine* court determined that, under the facts at hand neither the Director's legitimate administrative interests nor his or her pecuniary interest in protecting the fund was implicated. *Id.* at 380-82. Therefore, the court held that

> [the Director] does not meet the standing requirement imposeed by section 921(c) and may not, on his own initiative and without the company of the claimant, petition to review the Board's decision to this court. At bottom, the Director appears here to claim no more than an interest in receiving from the Board an interpretation of the [LHWCA]'s coverage consistent

> with his own belief as to what that coverage should be. The mere fact that the Board has chosen not to accept the Director's view does not aggrieve the Director in any meaningful sense and, hence, cannot give him standing to appeal. We are unable, therefore, under the statute to render the advisory legal opinion which the Director seeks by his petition to this court.

Id. at 382; *see also Director, Office of Workers' Compensation Programs v. Bethlehem Steel Corp.*, 620 F.2d 60, 63 (5th Cir. 1980) (holding that Director is not a person "adversely affected or aggrieved" by an order of the Board which denies disability payments under the LHWCA); *but see Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) ("[T]he Director's general supervisoryy and enforcement interest, apart from any pecuniary interest, is sufficient to confer upon the Director standing to file a petition for review under section 921(c).").

We adopted the clear logic of the Fifth Circuit court's *Donzi Marine* holding in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, F.2d 110 (4th Cir. 1982).[2] In that case, we

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[2] We had decided previously that the Director is not a proper *respondent* in a petition for review under section 921(c), "although upon application and for good cause shown he may be permitted to intervene therein." *I.T.O. Corp. v. Benefits Review Bd.* (*I.T.O. Corp. II*), 563 F.2d 646, 648 (4th Cir. 1977) (en banc) (adopting in full the view expressed in *I.T.O. Corp. v. Benefits Review Bd.* (*I.T.O. Corp. I*), 542 F.2d 903, 906-909 (4th Cir. 1976) (en banc), *vacated sub nom. Adkins v. I.T.O. Corp.*, 433 U.S. 904(1977)). In *I.T.O. Corp. I*, we recognized that section 921(c) requires an injury in fact, economic or otherwise. 542 F.2d at 907. We held the Director's asserted stake—that "[h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged"—was not sufficient to "confer upon the Director any specific interest in the proper administration of the Act." *Id.* at 907-08.

faced an appeal by the Director of the Board's decision that section 8(f) of the LHWCA limited the employer's duty to pay benefits to one hundred and four weeks. *Id.* at 112. Before addressing the merits of the appliability of the section 8(f) limitation, we question whether the Board's decision sufficiently implicated an administrative or economic interest of the Director so as to give rise to a redressable injury. The Board's decision would allow the employee to draw benefits from the LHWCA's special fund after one hundred and four weeks of employer compensation. We recognized that "the Director has an obligation to protect [the fund] from unjustified claims," *id.* at 113, and, therefore, that the Director may be best situated to complain when the fund is at risk of being improperly accessed, *id.* at 114. Noting that this grievance represented a valid injury, we held that

> the fact that the Director in this case has an additional interest in protecting the fiscal integrity of the special fund convinces us that the Director has standing to appeal the Board's decision.

Id.

Applying this analysis to the facts of the case at hand, we acknowledge that the Director clearly has standing to pursue an appeal on the applicability of the section 8(f) limitations pursuant to our holding in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982). The appealability of the first issue—the timing of the onset of partial disability—is more problematic. The Director asserts that the Board misapprehended the LHWCA's requirements for a detrmination of partial disability. The Director's claim challenges the Board's construction of the LHWCA, but does not press the remediation of an administrative or economic injury suffered by

the Director directly. The Board's construction of partial disability commencement does not alter the Director's ability to carry out his or her responsibilities under the LHWCA or to protect the fiscal integrity of the special fund.[3] We hold, therefore, that the Director has not persented a cognizable injury through the appeal of the partial disability issue and that we must refrain from addressing the merits of this issue based on the Director's lack of standing to raise it.

III

Turning to the merits of this appeal for which the Director has standing, we confront the issue whether, in determining Newport News's entitlement to section 8(f) relief, the Board applied the incorrect standard.

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[3] The only conceivable way in which the special fund might be implicated is if Newport News becomes insolvent and is no longer able to make the payments required under the LHWCA. If such a plight should befall Newport News, the Secretary of Labor has the discretion to make payments from the special fund to the Claimant. *See* 33 U.S.C. § 918(b). The possibility that the fund will be accessd under these circumstances is too tenuous to represent an injury in fact to the Director. Additionally, the position that the Director presses on appeal would have an unfavorable effect on the fund if tapped pursuant to section 918(b). The Board's holding permits Newport News to credit its payments due to the Claimant by $101.34 per weeks. If we were to reverse the Board's decision, on remand the ALJ could decide that the credit is not due at all or is available for more limited number of weeks. A decision adjusting the credit downward would increase the aggregate amount of compensation that Newport News owes the Claimant; therefore, if Newport News were to become insolvent, the burden on the fund would be larger than possible under the Board's current decision. This possiblity further emphasizes the absence of an injury to the Director resulting from the Board's decision to establish partial disability on May 6, 1988.

Section 8(f) of the LHWCA serves to limit the amount of benefits an employer must pay an employee for a work-related injury when the injury was preceded by a permanent partial disability. The section provides, in pertinent parts:

> (f) Injury increasing disability:
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> (1) In any case in which an employee having an existing permanent partial disability suffers an injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . . In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide . . . compensation payments or death benefits for one hundred and four weeks only. . . .
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> In all other cases in which the employee hs a permanent partial disability, found not to be due solely to that injury and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide . . . compensation for one hundred and four weeks only.

33 U.S.C. § 908(f)(1). In other words, when an employee, who has a pre-existing permanent partial disability, sustains an additional work-related injury that results in permanent partial disability, the employer must provide compensation for one hundred and four weeks only, if: (1) the ultimate permanent partial disability is due to both the work-related injury and the pre-existing partial disability, and; (2) the ultimate permanent partial disability is materially and substantially greater than a disability from

the work-related injury alone would be.[4]

To establish section 8(f) relief, the employer must show that the employee had a pre-existing permanent partial disability and that this disability was manifest to the employer prior to the subsequent work-related injury.[5] The employer also must establish that the subsequent work-related injury alone would not have caused the employee's ultimate permanent partial disability and that the ultimate permanent partial disability materially exceeds the disability which would have resulted in the absence of the pre-existing permanent partial disability. *See Id.; Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982).

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[4] For the remainder of this discussion, we will refer to the conditions giving rise to the first disability as the "pre-existing permanent partial disability"; the disability that serves as the basis for the current claim for benefits as the "ultimate permanent partial disability"; and the injury that culminated in the ultimate permanent partial disability as the "work-related injury."

[5] Although section 8(f) itself does not require the employer's manifest knowledge of the initial injury, courts have added this requirement to further the policy behind the limitation provision. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 550-51 (4th Cir. 1991); *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 648 (4th Cir. 1983). Section 8(f) operates to prevent employers from discriminating against disabled employees by firing or refusing to hire them based on the increased risk of work-related injury their pre-existing permanent partial disability poses. Courts have reasoned that if the employer has no knowledge of the pre-existing permanent partial disability, the employer cannot use it as a basis for discrimination; therefore, an employer must have known about a pre-existing permanent partial disability to seek relief from its impact on the ultimate permanent partial disability. *See, e.g., Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 n.5 (4th Cir. 1982).

The parties agree that the Claimant suffered from a pre-existing permanent partial disability and that the disability was manifest to the employer. The parties disagree, however, on the contribution element. Newport News advances the Board's decision that the section 8(f) limitation is available only when the employee's pe-existing permanent partial disability combines with the disability caused by the employee's subsequent injury "to cause a greater degree of impairment than that caused by the second injury alone." In other words, Newport News contends that an employer may seek section 8(f) relief any time a pre-existing permanent partial disability exists and contributes to a subsequent work-related injury.

The Director asserts that the section 8(f) limitation is available only when the employee's pre-existing permanent partial disability causes the employer to incur more compensation liability than it would had the employee not been disabled at the time of the subsequent work-related injury. The Director suggests the analysis should involve comparing a healthy employee with the pre-existing permanent partial disability. If a healthy employee's level of disability would be similar to the disabled employee's after suffering the subsequent work-related injury, then the pre-existing permanent partial disability does not make the ultimate disability materially and substantially greater.

The parties' interpretations of section 8(f) differ in how they define the word "disability." Newport News's position requires the equation of "disability" with "impairment." Thereby, an employee's pre-existing permanent partial disability contributes to a subsequent work-related injury if it causes the employee to suffer a greater level of physical impairment. In this case, greater impairment was demonstrated by the testimony of Dr. Harmon, who opined that the Claimant's cervical spine surgery resulted

in a five-percent whole boy impairment. He further suggested that this five-percent impairment joined with the subsequent lumbar injury "to create a greater impairment than would otherwise have occurred."

The Director's position utilizes the statutory definition of "disability" to construe section 8(f). The LHWCA defines "disability" as an "incapacity because of the injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Grafting this definition of disability into section 8(f) renders the following construction. The employer only should benefit from the section's limitation when the employee's pre-existing permanent partial disability contributes to the ultimate permanent partial disability to decrease the employee's overall wage-earning capacity. The Director contends that, if the pre-existing permanent partial disability only causes the ultimate permanent partial disability to be more physically impairing, but does not decrease the employee's overall capacity to earn, then the pre-existing permanent partial disability does not cause the ultimate disability to be "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1).

We reject both parties' constructions of section 8(f). Newport News's and the Board's interpretations require a showing that the pre-existing permanent partial disability combined with the Claimant's subsequent work-related injury to cause a greater degree of impairment than that which would have been caused by the work-related injury alone. Under Newport News's purported interpretation, an employer need only show medical evidence that a percentage of whole body impairment existed before the work-related injury, that a greater percentage of whole body impairment exists after the work-related injury, and that the ultimate permanent partial disability was causally

connected to the earlier impairment to satisfy its burden on the contribution element.[6] This showing eviscerates the requirement from section 8(f) that the ultimate permanent partial disability be *materially and substantially* greater than a disability from the work-related injury alone would be, by overlooking the possibility that the work-related injury alone could cause virtually the same level of disability as that manifested in the ultimate permanent partial disability through the contribution of the pre-existing permanent partial disability.

The Director suggests an interpretation of section 8(f) that allegedly will address the magnitude of the relationship between the ultimate permanent partial disability and a disability arising from the work-related injury alone. By requiring the employer to show that it incurs a larger compensation liability based on the ultimate permanent partial disability, the Director contends that the employer will

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[6] In support of its proposition, Newport News relies largely on our decisions in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 1298-99 (4th Cir. 1984); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 115 (4th Cir. 1982); *John T. Clark & Son of Maryland, Inc. v. Benefits Review Bd.*, 621 F.2d 93, 95-96 (4th Cir. 1980); and *Maryland Shipbuilding & Drydock Co. v. Director, Office of Workers' Compensation Programs*, 618 F.2d 1082, 1085 (4th Cir. 1980). We conclude that these cases are not relevant to the issues at hand, however, because they deal with an ultimate permanent *total* disability. An employer is entitled to section 8(f) relief from fully compensating a permanent total disaility when "the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury." 33 U.S.C. § 908(f)(1). Unlike the case of a permanent partial disability, under the circumstances of permanent total disability, the employer need not establish that the ultimate disability is materially and substantially greater than the disability otherwise would be due solely to the work-related injury.

establish that the ultimate permanent partial disability must be materially and substantially greater than that which would have resulted from the work-related injury alone. The Director's construction of section 8(f) involves a mechanical grafting of the statutory definition of disability found at 33 U.S.C. § 902(10) into the language of section 8(f), an approach rejected by the Supreme Court in *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 206 (1949).[7]

Because we find Newport News's construction of section 8(f) to overlook a basic premise of the section and we are compelled by *Lawson v. Suwannee Fruit & Steamship*

[7] *Lawson* presented the issue whether, in an earlier but substantially similar version of section 8(f), the pre-exiting permanent partial disability must be an economic disability. The Claimant had experienced a previous noncompensable partial disability, and sought compensation for an ultimate permanent partial disability triggered by a subsequent work-related injury. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 199 (1949). Recognizing that the LHWCA provides a statutory definition for disability, the Court noted that incorporation of this definition into section 8(f) would require the employer to pay total compensation, while applying a broader meaning to disability would implicate the special fund for a portion of the compensation benefits. *Id.* at 201.

Pointing to Congress's intent in enacting section 8(f) to prevent employers from declining to hire or firing employees with disabilities of any nature that would put them at an increased risk of work-related injury, the Court stated:

> If we read the definition into § 8(f)(1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision: the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result.

Id. at 201-02. The Court went on to hold that "the term 'disability' was not used as a term of art in § 8(f)(1)." *Id.* at 206.

Co.[8] to reject the Director's construction, we now turn to the task of discerning independently the reading of section 8(f) by which the Board and the ALJ are governed. To do this, we look again at the language of the statute:

> (f) Injury increasing Disability:
>
> (1) In any case in which an employee having an existing permanent partial disability sufferes an injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. . . . In all other cases of *total* permanent disability or of death, found not to be due solely to that injury, of an employee having an

[8] Recently, the Supreme Court addressed the proper construction of similar terms appearing in different sections of the LHWCA. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. __, 120 L.Ed. 2d 379 (1992). The Director suggests that this case should alter our application of *Lawson*, In *Cowart*, the Supreme Court was asked to construe the undefined term "person entitled to compensation" found in section 33(g)(1) of the LHWCA. *Id.* at 386; *see* 33 U.S.C. § 933(g)(1). In rendering its construction, the Court noted it must consider other provisions of the LHWCA containing the same term. The Court rejected the Board's construction of section 33(g)(1), holding that

> [the Board] had adopted differing intrpretations of the identical language in section 33(f) and 33(g). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same.

Cowart, 120 L.Ed. 2d at 391.

While the Court's holding in *Cowart* serves to advance consistent contruction of a single term throughout the LHWCA, it does not expressly disavow the Court's earlier position in *Lawson* as to the construction of section 8(f). Without clearer guidance from the Court, we continue to be bound by it precedent. Therefore, the Director's attempt to have us apply the LHWCA' statutory definition of "disability" to section 8(f) based on *Cowart* is in vain.

existing permanent partial disability, the employer shall provide . . . compensation payments or death benefits for one hundred and four weeks only. . . .

In all other cases in which the employee has a permanent *partial* disability, found not to be due solely to that injury, *and such disability is materially and substantially great than that which would have resulted from the subsequent injury alone,* the employer shal provide . . . compensation for one hundred and four weeks only.

33 U.S.C. § 908(f)(1) (emphasis added).

To establish section 8(f) relief when an employee is permanently totally disabled, the employer must establish: (1) that the employee seeking compensation had an "existing permanent partial disability" before the occurrence of the work-related injury; (2) that the pre-existing permanent partial disability was manifest to the employer; and (3) that the ultimate permanent total disability is "not [ ] due solely to th[e work-related] injury." *Id.; see Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982). When an employee is permanently partially disabled, but not totally disabled, section 8(f) informs us that the employer must make the additional showing that the ultimate permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1); *see also Two "R" Drilling Co. v. Director, Office of Workers' Compensation Programs,* 894 F.2d 748, 750 (5th Cir. 1990) (recognizing that a "heavier burden" is placed on the employer to obtain section 8(f) relief in the case of a permanently partially disabled employee).

To satisfy this additional prong of the contribution element, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability

materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

In this case, both the ALJ and the Board failed to require a showing of this "materiality prong" of the contribution element. We hold that, by not applying this component of the statutory standard, the ALJ and the Board erred as a matter of law in awarding section 8(f) relief to Newport News. In addition, we note that Newport News put on no evidence relevant to the "materiality prong."[9]

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[9] Newport News showed that the Claimant suffered from a pre-existing permanent partial disability in the cervical spine area that created a five-percent whole body impairment. After the work-related injury at issue, the Claimant suffered an ultimate permanent partial disability that produced whole body impairment of eighteen percent. Newport News introduced the following evidence concerning the correlation between the ultimate permanent partial disability and the disability that would have resulted from the work-related injury alone:

> . . . . Mr. Harcum's cervical spine condition also substantially contributes to his current level of disability. . . . The cervical and lumbar injuries, and the surgery they necessitated, clearly combined to create a greater impairment than would otherwise have occurred.

From this evidence, the ALJ concluded, and the Board affirmed, that the Claimant's pre-existing permanent partial disability combined with

IV

Concluding that the Director has no standing to raise the issue whether the Board erred as a matter of law in accepting the ALJ's determination of the Claimant's injury status change from that of temporary total disability to that of permanent partial disability, we decline to address that issue altogether. We reverse the ALJ's decision to assess the special fund for compensation payments to the Claimant after one hundred and four weeks of payments by Newport News pursuant to the provisions of section 8(f), and we remand for further proceedings before the ALJ not inconsistent with this opinion.

REVERSED AND REMANDED

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his subsequent work-related injury to cause a greater degree of disability than that which would have resulted solely from the work-related injury. This conclusion stops short of identifying whether the ultimate permanent partial disability is materially and substantially greater than a disability caused by the work-related injury only.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 92-1864 and 90-1287

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, RESPONDENT

v.

JACKIE H. HARCUM, CLAIMANT

On Petition for Rehearing with Suggestion for Rehearing In Banc

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FILED January 7, 1994

Respondent-employer filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the respondent-employer's suggestion for rehearing in banc. The original judicial panel voted to deny the petition for rehearing.

The government filed a petition for rehearing with suggestion for rehearing in banc. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Hall and Murnaghan voted to rehear the case in banc, and Judges Ervin, Widener, Phillips, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, Williams, and Michael voted against rehearing in banc. Judge Russell was disqualified and did not participate in the poll. The original judicial panel voted to deny the government's petition for rehearing.

The Court denies the petitions for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Niemeyer and Judge Ward.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

U.S. DEPARTMENT OF LABOR

BRB No. 90-1287

JACKIE H. HARCUM, CLAIMANT-RESPONDENT

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, SELF-INSURED EMPLOYER-RESPONDENT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

DECISION AND ORDER

DATE ISSUED: May 28, 1990

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (88-LHC-1635) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 340 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant was injured on October 21, 1984, during the course of his employment as a machinery installer when steel grating fell onto his lower back. He required a lumbar laminectomy, and a second operation to remove scar tissue. Employer voluntarily paid benefits for temporary total and temporary partial disability, 33 U.S.C. § 908(b), (e), for various periods until claimant was able to return to sustained light-duty employment in April 1987. ALJ Ex. 1. The parties stipulated that claimant reached maximum medical ipmrovement on December 7, 1987. On January 18, 1988, claimant returned to his usual employment as a machinery installer. He was unable to perform his heavy-duty regular employment due to residuals from the work injury, and employer therefore released claimant on May 6, 1988. In September 1988, employer referred claimant to a vocational counselor, who developed a placement program for claimant. Claimant obtained alternate employment with another employer as a tool room clerk on February 16, 1989, one month after he actually began applying for jobs with the counselor's assistance. Employer voluntarily paid benefits for total disability from May 6,

1988 to February 16, 1989, and employer thereafter voluntarily paid benefits for continuing permanent partial disability, 33 U.S.C. § 908(c)(21).

A formal hearing was held on October 29, 1989, to resolve the issues of claimant's entitlement to benefits for lost overtime when he worked for employer in light-duty employment, his entitlement to benefits for temporary total disability from January 18, 1988 to February 16, 1989, and employer's application for relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. § 908(f). The administrative law judge found that claimant was entitled to temporary partial disability benefits for lost overtime from April 11 to December 7, 1987, and he also awarded claimant benefits for temporary partial disability from January 18, until May 6, 1988, based on his finding that claimant was working in employment beyond his medical restrictions. These findings are not appealed. The administrative law judge next determined that claimant is entitled to continuing benefits for permanent partial disability commencing on May 6, 1988, based on employer's later showing of suitable alternate employment in February 1989. Employer was awarded Section 8(f) relief.

On appeal, the Director challenges the commencement date of claimant's award for permanent partial disability, arguing that it should begin on February 16, 1989, when claimant secured alternate employment as a tool room clerk, and that claimant is entitled to permanent total disability until that date. The Director also challenges the administrative law judge's award of Section 8(f) relief. Employer responds, urging affirmance. Claimant responds in support of the Director's argument that his permanent disability award should commence on February 16, 1989.

The Director first argues that the administrative law judge erred by relying on the Board's decision in *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *rev'd in*

pert. part sub nom. Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied,* 111 S.Ct. 798 (1991), as authority to begin the permanent partial disability award on May 6, 1988. The administrative law judge found that the job claimant obtained as a tool room clerk in February 1989 met employer's burden of demonstrating the availability of suitable alternate employment dating back to the day claimant was released by employer. He also found irrelevant claimant's argument that he is entitled to total disability benefits until February 16, 1989, because he delayed his job search in reliance on employer's promise after his release that it would seek light-duty work for him at its facility, and employer's subsequent contracting with a vocational rehabilitation specialist to assist claimant in securing alternate employment.

In *Stevens, supra,* the Board held that when employer establishes the availability of suitable alternate employment, an award for permanent partial disability should commence on the date of maximum medical improvement. *Stevens,* 22 BRBS at 157-158. The Board's holding was reversed on appeal to the United States Court of Appeals for the Ninth Circuit. *See Stevens,* 909 F.2d at 1259-1260, 23 BRBS at 94 (CRT). The court held that the date employer establishes that suitable alternate employment is available is the date total disability becomes partial. *Id.; accord Director, OWCP v. Berkstresser,* 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). The court commented that its holding would not prevent an employer from retroactively establishing the availability of suitable alternate employment at the date of maximum medical improvement, even if several years had passed, as employer may submit a retrospective job survey which the administrative law judge may find to be credible.

See Stevens, 909 F.2d at 77, 23 BRBS at 95 (CRT); *accord Palombo, supra,* 937 F.2d at 1260, 25 BRBS at 12 (CRT). Although the instant cases arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Board held in *Rinaldi v. Gernal Dynamics Corp.,* 25 BRBS 128 (1991), *modifying on reconsideration,* BRB No. 88-1721 (Jan. 29, 1991) (unpub.), that the court's rationale in *Stevens, supra,* will be applied in all circuits. Accordingly, the administrative law judge's reliance on the Board's decision in *Stevens* to commence claimant's award of benefits for permanent partial disability on May 6, 1988 is vacated. Pursuant to *Rinaldi, supra,* we hold that claimant's award should commence on the earliest date employer established the availability of suitable alternate employment. *See Rinaldi,* 25 BRBS at 131.

Nevertheless, we affirm the administrative law judge's award of permanent partial disability dating from May 6, 1988, as employer established suitable alternate employment at this time. In the instant case, after claimant obtained the position as a tool room clerk in February 1989, employer requested that Charles DeMark, a vocational consultant, identify specific job opportunities within claimant's work restrictions that were available between May and November 1988. Mr. DeMark located specific job opportunities as a desk clerk, service station attendant, and dispatcher that were actually available during that time, and which claimant's treating physician, Dr. Peach, approved as within claimant's injury-related work restrictions. EX 19-20. Specifically, three of the desk clerk positions were available in May 1988. EX 19 at 2-3. This uncontradicted evidence establishes, as a matter of law, that employer demonstrated the availability of suitable alternate employment as of May 1988. *See Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Hogan v. Schiavone Ter-*

minal, Inc., 23 BRBS 290 (1990); *see generally New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984).

Claimant, however, may rebut employer's showing of suitable alternate employment by showing that he diligently tried but was unable to obtain suitable alternate employment during the period after which employer established the availability of job opportunities within claimant's medical restrictions. *See generally Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Turner*, 661 F.2d at 1031, 14 BRBS at 156. In this regard, the Director argues that claimant's reliance on employer's offer that it would seek light-duty employment for claimant at its facility, and claimant's subsequent cooperation with employer's vocational consultant, establishes his diligence in seeking alternate employment after May 6, 1988. We disagree. After employer released claimant on May 6, 1988 because he was not physically able to perform his usual employment, it was required under the Act to establish the availability of suitable alternate employment or to provide claimant with continuing compensation for total disability. *See Turner, supra.* Employer, however, is not obligated under the Act to rehire claimant, *Turner, supra*, 661 F.2d at 1043, 14 BRBS at 165, to find claimant an actual job offer, *Palombo, supra*, 937 F.2d at 74, 25 BRBS at 6 (CRT), or to provide him the opportunity to apply for the actual jobs it contends establish the availability of suitable alternate employment, *see Tann, supra*, 841 F.2d at 543, 21 BRBS at 15 (CRT). Accordingly, employer's statement that it would determine whether a light-duty position was available at its facility, and its subsequent hiring of a vocational consultant to assist claimant in securing alternate employment, do not affect its showing of suitable alternate employment in May 1988 or establish that claimant

exercised diligence in seeking alternate employment. *See generally Palombo, supra*, 937 F.2d at 73-74, 25 BRBS at 6-8 (CRT).

The uncontradicted evidence in this case establishes that although claimant cooperated fully with Mr. DeMark after his referral in September 1988, claimant did not contact potential employers after his release on May 6, 1988, until January 20, 1989, and he successfully secured alternate employment within a month thereafter on February 16, 1989. Tr. at 43, 105. Under these circumstances, claimant has not rebutted employer's showing of suitable alternate employment dating to May 1988. *See Turner, supra*, 661 F.2d at 1043, 14 BRBS at 165. Accordingly, as a matter of law, we hold that employer established the availability of suitable alternate employment in May 1988, and, pursuant to *Rinald, supra*, claimant's award of benefits for permanent partial disability should commence on May 6, 1988, when claimant was released from his employment with employer. The Director's arguments are therefore rejected, and we affirm the administrative law judge's permanent partial disability award commencing May 6, 1988.[1]

The Director next challenges the administrative law judge's award of Section 8(f) relief.[2] The Director argues

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[1] As a result, we affirm the administrative law judge's finding that employer is entitled to offset its overpayment of total disability benefits after May 6, 1988 against its liability for permanent partial disability benefits. 33 U.S.C. § 914(j) (Supp. V 1987).

[2] In the case of permanent partial disability, employer is entitled to Section 8(f) relief if it establishes (1) that claimant has a pre-existing permanent partial disability; (2) that the disability was manifest to employer; and (3) that claimant's ultimate disability is materially and substantially greater due to the combination of the disabilities than it would be due to the work injury alone. *See Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991); 33 U.S.C. § 908(f)(1).

that employer failed to establish the existence of a serious and lasting pre-existing disability that combined with claimant's work injury to cause a materially and substantially greater degree of permanent disability than the degree of disability caused by the work injury alone. Prior to claimant's October 21, 1984, work injury, claimant sustained lumbar muscle strains in 1965, 1966, and 1977. X-rays taken after the 1966 back injury revealed a sacral arch defect. Additionally, in 1983 claimant sustained a herniated cervical disc from a work-related injury, which required surgery, and which resulted in a 5 percent permanent partial disability. Claimant's October 1984 back injury ruptured the lumbar disc that the 1966 x-rays revealed had the sacral arch defect. The administrative law judge credited the uncontradicted medical opinions of Drs. Harmon, Peach and Bobbitt that claimant's prior back injuries and neck injury are serious and lasting pre-existing permanent partial disabilities that combined with claimant's October 1984 work injury to cause a greater degree of diability than would have resulted from the October 1984 injury alone. He further found that claimant's pre-existing disabilities were manifest to employer from its clinic records, and accordingly awarded employer Section 8(f) relief. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984).

The Director first challenges the administrative law judge's finding that claimant's three prior back injuries and sacral arch defect constitute a serious and lasting pre-existing permanent partial disability. However, the Director does not challenge the administrative law judge's finding that claimant's prior neck injury also is a pre-existing permanent partial disability for purposes of awarding Section 8(f) relief. Accordingly, we need not address the

Director's argument regarding claimant's pre-existing back condition.

The Director next challenges the administrative law judge's finding that claimant's pre-existing neck impairment combined with the disability caused by claimant's subsequent back injury to cause a greater degree of impairment than that caused by the second injury alone. Specifically, the Director argues that the proper standard for determining whether the contribution element of Section 8(f) is met is whether claimant sustained a greater loss of wage-earning capacity due to the combination of the prior and subsequent injuries than the loss of wage-earning capacity he sustained due to the second injury alone. The Director's argument was addressed and rejected by the Board in *Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991). For the reasons stated in *Luccitelli,* we hold that the administrative law judge properly found that employer established the contribution element based on the medical opinions of record.[3] *See also Sproull v. Stevedoring Services of America,* 25 BRBS 100, 111 (1991). As the Director does not appeal the administrative law judge's finding that claimant's pre-existing neck impairment was manifest to

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[3] Only Dr. Harmon's opinion clearly meets the contribution element. Dr. Harmon stated that claimant's cervical spine condition substantially and materially contributes to his current level of disability, and that the cervical and work injuries and the surgery they necessitated combined to create a greater impairment than would otherwise have occurred. EX 16. Dr. Bobbitt noted that claimant had a five percent impairment from the cervical disc surgery and that claimant's disability is materially increased by the work injury and disc herniation; however, it is the pre-existing injury that must materially increase the resulting disability. EX 8. Dr. Peach, who performed both the cervical and lumbar laminectomies, states only that claimant has an 18 percent whole man impairment as a result of the disc problems and the two previous surgical procedures. EX 10 at 46.

employer, we therefore affirm the administrative law judge's award of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Sheldon R. Lipson
SHELDON R. LIPSON
Administrative Law Judge

APPENDIX D

[SEAL]

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 201
55 West Queens Way
Hampton, Virginia 23669
804-722-0571

CASE NO.: 88-LHC-1635
OWCP NO.: 5-53121

IN THE MATTER OF

JACKIE H. HARCUM, CLAIMANT

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, EMPLOYER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

Appearances:
John H. Klein, Esq.
For the Claimant
James M. Mesnard, Esq.
For the Employer
BEFORE: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.* A hearing was held on October 20, 1989.[1]

Stipulations

The Employer and the Claimant entered into the following stipulations:

1. That jurisdiction of the Act over this claim is appropriate;
2. That an employer/employee relationship existed at all pertinent times;
3. That the Claimant sustained an injury arising out of and in the course of employment on October 21, 1984;
4. That the Claimant's average weekly wage on October 21, 1984 was $662.43 per week;
5. That the Claimant reached maximum medical improvement on December 7, 1987;
6. That the Claimant has not worked at the Shipyard since May 5, 1988;[2]
7. That the number of overtime hours worked listed on Claimant's wage and overtime printout (EX E-1, p. 2) reflects the actual number of overtime hours worked. Thus, the Claimant worked 48 hours of overtime in 1988 (Tr. 50-53).
8. That the Claimant's wage-earning capacity adjusted back to the date of injury is $3.80 per hour for 40 hours

[1] The parties filed post-hearing briefs. The Employer filed a response to the Claimant's brief. The response brief was not authorized by the Presiding Judge and will not be considered.

[2] Stipulations 1-6 appear at Tr. 5-8.

per week. Thus, the Claimant's wage-earning capacity is $152.00 per week.[3]

9. That there was a timely claim for compensation, notice of injury and notice of controversion (ALJ 1; Tr. 5, 6).

Issues

1. Is the Claimant entitled to a temporary partial disability award for lost overtime from April 11 through December 7, 1987?
2. Is the Claimant entitled to a temporary total disability award from January 18, 1988 through May 6, 1988?
3. Is the Claimant entitled to a temporary total disability award from May 6, 1988 until February 16, 1989?
4. Is the Employer entitled to relief pursuant to Section 8(f) of the Act?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jackie H. Harcum

Jackie H. Harcum was 48 years old on the hearing date and resides in Hampton, Virginia. He completed 11th grade and eventually earned his G.E.D. in the Army (Tr. 24, 25; EX 14, p. 6). The Claimant took a pre-employment physical at the Shipyard which he passed; he began working for the Employer in February 1963 with no work restrictions (Tr. 25).

The Claimant worked in the X-43 Machinery Installation Department. He performed such heavy work on ships as lifting 75-100 pounds, frequent bending, working in tight quarters, climbing a lot of steps and ladders, and pushing and pulling (Tr. 25-28).

[3] Stipulation 8 is referred to in the Employer's January 24, 1990 cover letter to its brief. The Claimant refers to this stipulation in his brief at pp. 5-6.

On October 21, 1984, while working on a steam barge, the Claimant sustained a back injury when a 30-40 pound steel plate fell about four feet and struck his back while he was leaning over (Tr. 29, 30). He went to the Shipyard clinic and was referred to Dr. Peach. Dr. Peach had treated the Claimant in the past and had also performed an operation on the Claimant's neck. As a result of the October 21, 1984 injury, Dr. Peach performed two operations on the Claimant's back (Tr. 30).

The Claimant testified that prior to his injury, overtime work was available on a regular basis on the weekends in the X-43 Department. The claimant believed that of the approximately 800 hours per year of overtime offered, he took advantage of about half that amount. The Claimant maintained it was difficult to work 16 hours of overtime every weekend (Tr. 31, 33, 46, 47). The Claimant's overtime record clearly corroborates the Claimant's testimony that prior to his 1984 injury he averaged in excess of 400 hours overtime from 1977 through October 21, 1984 (CX 3, p. 2). The overtime record shows he worked the following amounts of overtime:[4]

1977—423.1 hours
1978—450.2 hours
1979—356.5 hours
1980—376 hours
1981—443.7 hours
1982—460.5 hours
1983—459.9 hours
1984—406.0 hours

Prior to his 1984 injury, the Claimant worked on a crew supervised by Mr. Wainwright. The Claimant identified a

[4] The Claimant averaged 421.9 hours of overtime during this approximate 8-year period.

co-worker on that crew as "Scobie" Watson. The Claimant testified that he believes that individual has since retired (Tr. 44-47). Shipyard records reflect that a Mr. Watson did accrue overtime from 1979 through 1988 (CX 3, p. 1).

The Claimant eventually returned to work with restrictions. There was no work available within his restrictions in the regular X-43 Department. Consequently, the Claimant was assigned to the MRA Shop with other workers with work restrictions (Tr. 32). He worked in the MRA Shop from April 11, 1987 through December 7, 1987 (Tr. 32). While in the MRA Shop, the Claimant worked only 40 hours per week. Overtime was not available to MRA Shop employees (Tr. 32, 33).

Mr. Harcum testified that while he was in the MRA Shop, the X-43 Department continued to have overtime available on a regular basis. Indeed, the Claimant noted that in his 25-year experience as an X-43 Department employee, overtime was regularly available in that department. He recalled that while working in the MRA Shop, he would see members of Mr. Wainwright's crew about twice a week and would ask about overtime. They indicated to him that overtime was available almost every weekend (Tr. 45, 46). Yet, during his prior deposition, the Claimant had stated he did not know how he was aware that overtime was available to Wainwright's crew while he was working in the MRA Shop (EX 14, p. 14).[5] The Claimant further stated that had he not been working with restrictions in the MRA Shop, he would have taken ad-

[5] I find that the deposition testimony does not affect the credibility of the Claimant's hearing testimony. I find the Claimant's testimony in regard to his own overtime as well as that of other workers in X-43 Department to be forthright and credible. Even the Shipyard records introduced at hearing corroborate the Claimant's testimony that overtime was available to workers in the X-43 Department from 1977 through 1989 (CX 2, 3; EX 18).

vantage of overtime with his old crew under Mr. Wainwright (Tr. 33, 34).

On January 18, 1988, the Claimant returned to the X-43 Department. He was moved from the MRA Shop and assigned work aboard an aircraft carrier. He was still under Dr. Peach's care and still under work restrictions from Dr. Peach (Tr. 34). To get to his work station, the Claimant was required to climb two flights of stairs to get on the aircraft carrier. Then he had to descend 5 steeper flights of permanent shipboard steps to the work level. He described the 5 flights onboard the ship as "a ladder with handrails". (Tr. 34, 35, 47-49; EX 14, pp. 18, 19). He was required to climb these flights numerous times during his work day (Tr. 49; EX 14, p. 17). The Claimant maintained that this daily climbing irritated is back "real bad" and caused pain which ran down his legs. He averred that he barely got through each work day because of the pain caused by climbing (Tr. 35, 53, 54). The Claimant agreed that during the time he worked on the aircraft carrier, from January until May 6, 1988, he did work 48 hours of overtime. This constituted about three weekends of overtime (Tr. 50-55). However, the Claimant maintained that other members of his crew worked more overtime than he did and overtime was made available every weekend to his crew (Tr. 62).

The Claimant maintained that this work was about as physically strenuous as his pre-injury work in X-43 Department (Tr. 34). He complained to Mr. Payne, his supervisor. Mr. Payne sent him to Dr. Bobbitt at the Shipyard clinic. Dr. Bobbitt, in turn, sent him to Dr. Peach. Dr. Peach gave the Claimant a letter for the clinic. The letter addressed the Claimant's climbing restriction.[6] (Tr. 35, 56, 50). Notwithstanding the letter, the Shipyard made no

[6] Dr. Peach's letter is dated March 22, 1988 (EX 10, pp. 49, 50).

changes in the nature of the Claimant's work. He continued to complain until he was "passed out" on May 6, 1988 (Tr. 36, 37).

The Claimant testified that although he later filed a claim for benefits over this matter, he did not specifically file a grievance through his union concerning the alleged work restriction violation (Tr. 53). He did not get along with the union. At an earlier deposition, the Claimant maintained that he has filed a union grievance over this matter; however, he never heard anything about it being resolved (EX 14, p. 20).

When the Claimant was "passed out" on May 6, 1988, he began collecting temporary disability payments of $442.62 per week. He was told that the Shipyard would look for another job for the Claimant in the Shipyard (Tr. 38, 57, 58). He did not begin to look for another job outside the Shipyard at that time because he was still on the company roles and might still return to another job (Tr. 57, 58). The Claimant next heard from the Shipyard in August, 1988. He received a letter from Mr. Decker setting up a meeting in the Personnel Department. At that meeting, Mr. Decker told the Claimant that the Shipyard could find no other jobs for the Claimant within his restrictions. The Claimant's employment would be terminated after 30 months. He was also told that he was being referred to Mr. DeMark, a rehabilitation counselor (Tr. 30-40).

The Claimant later met with Mr. DeMark who gave him some tests (Tr. 40). Eventually, Mr. DeMark prepared the Claimant's resume. Then, when Mr. DeMark suggested he seek employment, the Claimant complied (Tr. 40, 41, 58). The Claimant began to check out his own leads as well as those suggested by Mr. DeMark about January 1, 1989 (Tr. 41, 61). He went to every job suggested by Mr.

DeMark (Tr. 41). He finally got a job offer from Hampton Sheet Metal to start on February 16, 1989. The job started at $4.00 per hour and now pays $5.00 per hour. He is now a tool room clerk and the work is within his physical abilities. Mr. DeMark spoke to the employer prior to the job offer (Tr. 42-44).

George Decker

George Decker is the Supervisor of Employee Relations for the X-43 Machinery Installation Department and the X-44 Insulation Department (Tr. 63, 64). He is responsible for administering the labor agreement and maintaining employment records of both hourly and salaried employees.

Mr. Decker stated that under the collective bargaining agreement, every attempt is made to divide overtime equally in each pay rate classification (Tr. 67, 68, 78, 79). He identified a Mr. Kaufman as one employee in the same pay rate classification as the Claimant while the Claimant was working on the aircraft carrier from January 1988 until May 6, 1988 (Tr. 68, 69).[7] Mr. Decker also identified Messrs. Hopson, Conner and Holmes as three individuals with the same seniority as the Claimant.[8]

Mr. Decker agreed that from May to August, 1988, the Shipyard conducted a job search within the Shipyard for the Claimant. Had that seach been successful, the Claimant would have been put to work elsewhere in the Shipyard (Tr. 74, 75). He further acknowledged that he did not contact the Claimant during the time that the job search was ongoing (Tr. 75). The job search proved to be unsuccessful

[7] Mr. Kaufman's overtime hours from 1977 to 1989 are listed at EX 18.

[8] Their respective overtime hours from 1977 to 1989 appear at CX 2a-c.

in August 1988. The clinic notified Mr. Decker (Tr. 74). Mr. Decker met with the Claimant on August 24, 1988 and told him of the job search results. He further told the Claimant that he would be placed on an inactive status for 30 months, after which the employment relationship would end (Tr. 70). Mr. Decker further testified that the effective date of transferring the Claimant to the inactive roll was then made retroactive to May 6, 1988 (Tr. 75, 76).

Mr. Decker equivocated whether the Claimant's verbal complaints to his supervisor about his job exceeding his work restrictions could be interpreted as sufficient to comply with initiating the first step requirement for a grievance (Tr. 76, 77). A union representative need not be present to initiate a complaint (Tr. 77). However, to go any farther along in the grievance procedre requires union involvement (Tr. 78).

Francis DeMark

Francis DeMark is a Certified Rehabilitation Counselor (Tr. 83, 84). The Claimant was referred to him by the Shipyard. Mr. DeMark and the Claimant had their first meeting on September 20, 1988 (Tr. 84, 85). During the first meeting, the Claimant appeared to be quite anxious at the prospect of a career change after more than 20 years at the Shipyard. The Claimant indicated that he desired to return to the Shipyard and Mr. DeMark agreed to check out the possibility (Tr. 101-103).[9] At this first meeting, the Claimant was not presented with any job leads (Tr. 99). Then, over the next few months, Mr. DeMark developed a job placement and rehabilitation program for the Claimant. He obtained the Claimant's medical records concern-

[9] Mr. DeMark's later conversation with Dr. Harmon on November 29, 1988, made it fairly clear that the Claimant could not return to the Shipyard (Tr. 103).

ing work restrictions from Dr. Peach on October 5, 1988 (Tr. 85, 86). He counseled the Claimant extensively concerning his rehabilitation program and job interviewing skills (Tr. 85). At Mr. DeMark's suggestion, the Claimant obtained a chauffeur's license (Tr. 89). The Claimant was administered a battery of vocational tests on November 1, 1988 (Tr. 104). A resume was completed for the Claimant on January 20, 1989 (Tr. 109). That same day was the first day that Mr. DeMark and the Claimant "really sat down with the newspaper and looked at job listings and started talking about actually applying for jobs." (Tr. 105). That was the date when the Claimant began looking for jobs on a full time basis. (Tr. 105, 106).

Mr. DeMark agreed that the Claimant was extremely cooperative throughout the whole process. He did everything asked of him within a reasonable time (Tr. 98). Mr. DeMark also agreed that the Claimant was relying upon him to find a job (Tr. 99). Mr. DeMark also believes that he did provide Claimant the confidence to present himself in a positive manner to potential employers (Tr. 113). The Claimant responded well to all counselling efforts and by January 25, 1989, he had applied for jobs (Tr. 106).

On February 14, 1989, Mr. DeMark saw a newspaper ad for a tool room clerk position at Hampton Sheet Metal. He personally took a copy of the Claimant's resume and drivers license to the prospective employer. He gave the company a profile of the Claimant's work restrictions and vocational situation. Mr. DeMark immediately set up an interview for the Claimant at the company on the following day. After setting up the interview, Mr. DeMark met with the Claimant. The following day, the Claimant had an interview and was immediately offered a job starting at $4.00 per hour. Mr. DeMark agreed that he had recommended that the Shipyard offer to pay for on-the-job training as an incentive for a prospective employer to hire

the Claimant. An on-the-job training program was implemented at Hampton Sheet Metal and the Claimant completed it successfully. His present pay is $5.00 per hour (Tr. 89-91). The Hampton Sheet Metal job offer was the first job offer which the Claimant received (Tr. 107).

Subsequent to the Claimant's employment by Hampton Sheet Metal, the Shipyard, through counsel, requested that Mr. DeMark conduct a labor market survey of available jobs for which the Claimant may have qualified from May 6, 1988 to February 15, 1989 (Tr. 93). After receiving input from Dr. Peach concerning the Claimant's restrictions (EX 20), Mr. DeMark centered his attentions on such approved restrictions as dispatcher, service station attendant and motel/hotel desk clerk (Tr. 94). Mr. DeMark listed eleven job possibilities which were available during that time period and for which the Claimant was qualified (EX 19). Counsel for the Claimant did not contest the existence of those jobs as described in Mr. DeMark's report (Tr. 95). Mr. DeMark found no reason why the Claimant could not have sought employment during that time period (Tr. 89, 90). Mr. DeMark estimated that the Claimant's wage earning capacity from May 6, 1988 to February 16, 1989 was $4.00 per hour (Tr. 95, 96). Mr. DeMark agreed that he never brought any of these jobs to the attention of the Claimant. Nor was Mr. DeMark aware of these jobs while he was working with the Claimant (Tr. 109).

MEDICAL EVIDENCE

The Shipyard clinic records document several back injuries. The Claimant sustained a lumbar muscle strain on June 3, 1965 and a lumbo-sacral strain on February 8, 1966 (EX 7, p. 2). The 1965 injury was treated with Darvon by the clinic (EX 7, p. 18). The 1966 injury was located

in the Claimant's spine at L5-S1, 1 and x-rays revealed a sacral arch defect (EX 7, pp. 16, 18).

The Claimant's next back injury occurred on February 7, 1977 while lifting a pump. He was diagnosed as having sustained a lumbar strain; he was placed on work restrictions and was "passed out" from February 27, 1977 through March 28, 1977 (EX 7, p. 9). The Claimant continued to be treated for about 9 months for his back (EX 7, pp. 20-21).

The Claimant sustained left shoulder injuries on February 27, 1981 and December 13, 1983 (EX 7, pp. 11-12). The 1983 injury was originally treated by Dr. Prillaman, an orthopedist (EX 7, p. 14). By January, 1984, the Claimant's condition had not improved. Dr. Prillaman referred the Claimant to Dr. Peach, a neurosurgeon (EX 9).

Dr. Peach examined the Claimant on January 19, 1984 and admitted the Claimant to Riverside Hospital for a cervical myelogram. The myelogram was performed, and it revealed a herniated cervical disc at C6-C7 (EX 10, pp. 1-4). Dr. Peach performed a hemilaminectomy to remove the herniateddisc on January 27, 1984 (EX 10, p. 6), and the Claimant was discharged from the hospital on February 4, 1984 (EX 10, p. 8).

The Claimant progressed well after he was released from the hospital, and Dr. Peach returned him to work on March 5, 1984 (EX 10, pp. 9-10). The Claimant was totally disabled from January 4, 1984 through March 4, 1984, and he was voluntarily paid temporary total disability for this period (EX 15, pp. 2-3).[10]

On October 21, 1984, the Claimant was working inside a bilge on a steam barge when someone knocked over a piece of grating, and it struck the Claimant in the low

[10] The Claimant's interrogatory answers indicate that he still experiences "stinging" in his neck (EX 13, p. 2).

back. The Claimant was diagnosed as having sustained a lumbar contusion (EX 7, p. 13). His symptoms continued (EX 7, pp. 24-25), and on November 26, 1984, the Claimant selected Dr. Peach to treat this injury (EX 7, p. 15).

Dr. Peach examined the Claimant on November 28, 1984, and Dr. Peach suspected that the Claimant might have a herniated lumbar disc (EX 10, pp. 11-13). A lumbar myelogram was performed on December 31, 1984, but it was negative (EX 10, p. 15). A CT scan, however, indicated a bulging or herniated disc at L5-S1 (EX 10, p. 16).[11] When an injection of lumbar steroids did not alleviate the Claimant's complaints, Dr. Peach performed a hemilaminectomy at L5-S1 (EX 10, pp. 18-20).

The Claimant was discharged from the hospital on January 17, 1985, but he did not progress as hoped. Another CT scan and more x-rays were performed in March 1985, and these tests suggested problems at the site of the recent surgery (EX 10, pp. 22-24). On March 15, 1985, Dr. Peach surgically explored the site of the earlier surgery, and removed some scar tissue. Dr. Peach also freed the nerve root from an adhesion (EX 10, p. 26). The Claimant was discharged from Riverside Hospital on March 20, 1985 (EX 10, p. 27), but his course of recovery was protracted (EX 10, pp. 28-29).

Dr. Peach examined the Claimant on July 2, 1985, and the doctor's notes reflect his opinion that the Claimant had progressed to a point where he could return to work on some type of restricted duty (EX 10, p. 31). The Claimant underwent another injection of lumbar epidural steroids on August 2, 1985 (EX 10, p. 32). Dr. Peach wrote the Employer's clinic on September 17, 1985, and stated that the Claimant looked healthy, but he told Dr. Peach that

[11] This is the same level at which a sacral arch defect was noted in 1966 (EX 7, pp. 16, 18).

he was not much better. Dr. Peach explained to the Claimant that he would not be absolutely pain free, but the doctor also felt that Claimant should return to light duty work (EX 10, p. 34).

The Claimant returned to light duty on October 4, 1985 (EX 2, p. 3; EX 7, pp. 29, 57), but he immediately went to the clinic complaining of pain, and he was passed back out. The Employer's clinic sent the Claimant to Dr. K. Singh Sahni at the Medical College of Virginia (MCV) for an evaluation because of his complaints (EX 7, pp. 79-80), but other than continued conservative treatment, Dr. Sahni had no suggestions for further treatment (EX 11).

Dr. Peach wrote Dr. Bobbitt on December 19, 1985 and expressed some frustration with the Claimant's continued complaints of great pain, when Dr. Peach could find no objective evidence of that degree of symptomology (EX 10, pp. 35-36). The Claimant returned to light duty work again in January 1986 (EX 2, p. 4), and he was assigned to the Shipyard's MRA shop (EX 7, p. 59).

During the remainder of 1986, the Claimant worked under light duty restrictions (EX 2, p. 4; EX 7, pp. 59-66). He was also treated sporadically by Dr. Peach (EX 10, p. 37). In January 1987, the Claimant complained of leg pain, and a facet block injection was performed on January 28, 1987 at Riverside Hospital (EX 10, pp. 40-42). The injection caused some temporary relief, but the Claimant still had pain in his low back (EX 10, p. 44), and he continued to work under restrictions (EX 7, pp. 66-70).

Dr. Peach determined that the Claimant had reached maximum medical improvement on November 4, 1987, and on that date the doctor imposed permanent restrictions of lifting no more than thirty pounds on a repetitive basis, and that the Claimant should work in an area where he could alternate between sitting and standing. It was also noted that the Claimant should be able to stretch from

time to time. Finally, Dr. Peach restricted the Claimant to no climbing of vertical ladders. However, Dr. Peach saw no reason why the Claimant could not climb steps (EX 10, p. 45). The Employer's clinic instituted the restrictions as ordered by Dr. Peach (EX 7, p. 71). On December 1, 1987, Dr. Peach advised the clinic that the Claimant had a permanent 18% whole body impairment based on the AMA Guides (EX 10, p. 46).

The Claimant had been assigned to the MRA Shop during his convalescence, but when his restrictions became permanent, he was returned to his department at the Shipyard (EX 7, p. 83). The Claimant was assigned work within his restrictions (EX 7, p. 72), but he continued to complain of pain (EX 7, p. 45).

In a January 11, 1988 note, Dr. Peach requested that the Claimant avoid either ladders or steep steps (EX 10, p. 47). Dr. Peach further stated, "If any work could be found off the ship, I see no reason why he could not continue to work full time." On January 11, 1988, the clinic acknowledged Dr. Peach's request for non-shipboard work (EX 7, p. 45). On January 18, 1988, the Claimant complained to Dr. Bobbitt of back pain caused by the shipboard climbing; however, Dr. Bobbitt told the Claimant that if he wanted his restrictions changed, he had to see Dr. Peach (EX 7, p. 46). The Claimant did so on that very date. Dr. Peach's January 18, 1988 treatment note which was sent to the Shipyard clinic restated the doctor's opinion that the Claimant should work in a non-shipboard shop setting. Moreover, Dr. Peach specifically stated, "I still strongly feel that he should not be climbing ladders or steep steps aboard ship" (EX 7, p. 48).

After the Claimant complained to the U.S. Department of Labor that he was being worked outside his restrictions, Dr. Bobbitt contacted Dr. Peach and requested clarification of the term "steep stairs" used in Dr. Peach's January

11, 1988 note. This was done on March 4, 1988 (EX 7, p. 85). Dr. Bobbitt did not reference Dr. Peach's January 18, 1988 note and explanation.

Dr. Peach's March 22, 1988 letter states unequivocally:

> When I referred to the steep steps, I was referring to the usual type of steps aboard ship that are usually greater than 60 degrees in incline, fairly typical of what I am familiar with from when I worked on aircraft carriers at the Shipyard.
>
> I just feel that since the patient is required to climb two flights to get aboard the carrier, go down, and then back up another five flights to and from the area in which he is working that this is somewhat stressful on someone with a chronic problem like Mr. Harcum. I guess the ideal environment would be if he could continue to work in the machine shop where he was moving a little more, where he could constantly turn, sit briefly, lean, etc., rather than have to be in the forward flexed position for long periods of time. I have explained to Mr. Harcum that this situation may not be obtainable, in which case his choices are to put up with his discomfort or to quit the job and find another job. Mr. Harcum does not want to quit the job and find another job. Mr. Harcum does not want to quit his job, so I suggested that he talk with his supervisor to see if any other work is available in a shop setting.
>
> His most recent exacerbation of discomfort I feel could best be treated with an epidural block, and we will carry this out.

Dr. Hamill performed a lumbar epidural steroid injection on March 31, 1988 (EX 10, p. 51). On May 3, 1988,

the Shipyard clinic changed the Claimant's permanent restrictions to the following (EX 7, pp. 73, 74):

> No lifting over 30 lbs. Should work in area that allows frequent change of position. No ladder climbing. Limited stair climbing. Recommend no more than 2 flights 4 times a day.

There was no work available within these restrictions in the Claimant's home department and he was passed out (EX 10, p. 74). A search of other departments in the Shipyard was conducted, and the Employer's personnel office had the Claimant fill out a transfer application in case permanent light duty work was located elsewhere, but none was found (EX 7, pp. 87-90).

Dr. Harmon reviewed the Claimant's Shipyard clinic record and his outside clinic records.[12] He noted that following the Claimant's employment at the Shipyard, the Claimant sustained a series of back injuries beginning in 1965. Dr. Harmon opined that the low back injuries sustained in the 1960's and 1970's, as well as the sacral arch defect detected in a 1966 x-ray, constitute a pre-existing permanent partial disability. These injuries permanently weakened the Claimant's low back, and made him more susceptible to injury with a more severe resulting disability. Second, Dr. Harmon opined that according to the AMA Guides, the Claimant's 1984 cervical spine caused a 5% permanent partial disability. Dr. Harmon went on to say:

> It is obvious that Mr. Harcum's current low back condition was not caused by any one injury. Rather, it is clear that Mr. Harcum's current low back condition is the result of cumulative and repeated lumbar injuries. Each injury aggravated Mr. Harcum's low back prob-

[12] Dr. Harmon's report is dated March 15, 1989 (EX 16).

lems and made him more susceptible to further back injuries, and each injury increased the severity of the subsequent injuries. This clearly constitutes a pre-existing permanent partial disability, and a cautious employer would not have hired Mr. Harcum with this manifest condition.

Additionally, Mr. Harcum's cervical spine condition also substantially contributes to his current level of disability. As a result of shoulder injuries in 1981 and 1983, surgery was performed on Mr. Harcum's cervical spine. As I noted previously, this equates to a five percent (5%) whole body impairment. I agree with Dr. Peach's statement in his December 1, 1987 letter. Dr. Peach indicated that Mr. Harcum's level of whole body impairment is a result of two surgical procedures: the 1984 surgery on Mr. Harcum's cervical spine and the 1985 surgery on his lumbar spine. The cervical and lumbar injuries, and the surgery they necessitated, clearly combined to create a greater impairment than would otherwise have occurred. This condition was manifest in Mr. Harcum's clinic record, and a cautious employer would not have hired him with this condition.

Dr. Peach's December 1, 1987 letter indicates his opinion that the Claimant's permanent partial disability is due in part to both surgical procedures which involved the Claimant's cervical and lumbar spinal areas (EX 10, p. 46).

Dr. Bobbitt also reviewed the medical records and submitted an opinion dated November 18, 1988 (EX 8, pp. 3, 4, 5). From this review of the records as well as his knowledge of the Claimant, Dr. Bobbitt opined: "It is clear that Mr. Harcum had a pre-existing partial impairment or disability that was materially increased by the second injury and disc herniation."

Is the Claimant entitled to a temporary partial disability award for lost overtime from April 11, through December 7, 1987?

It is clear from the Claimant's testimony as well as the Company records of his overtime work in the X-43 Department that prior to his October 21, 1984 injury, overtime work was available to the Claimant and he took advantage of a considerable amount of that overtime. I find his testimony quite credible that he took advantage of about half of the estimated 800 overtime hours offered on an annual basis. He averaged in excess of 400 hours of overtime work available from 1977 until his injury in 1984. It is also clear that while the Claimant was working on restriction in the MRA Shop from April 11, 1987 through December 7, 1987, no overtime work was available to MRA Shop employees. Had such overtime work been available, the Claimant would have worked overtime. Yet, during that same time, overtime was still available on a regular basis in the X-43 Department to members of his old crew under Mr. Wainwright's supervision.

The Claimant need only show that absent his injury, he would have worked available overtime. I find that the evidence of record is sufficient to demonstrate a loss of overtime which resulted in a loss of wage-earning capacity during the time he worked in the MRA Shop which entitles him to temporary partial disability compensation. *See Brown v. Newport News Shipbuilding*, BRB No. 87-957 (November 27, 1989).[13]

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[13] The Claimant was previously paid compensation for loss of overtime on a voluntary basis by the Employer for loss of overtime at the rate of $87.83 per week (ALJ 1, pp. 5-6). This same rate is to be applied to the period from April 11, 1987 through December 7, 1987.

Is the Claimant entitled to a temporary total disability award from May 6, 1988 until February 16, 1989?

The parties agree that at the present time, the Claimant has a wage-earning capacity of $152.00 per week. This is based upon the fact that the Claimant has been working at Hampton Sheet Metal since February 16, 1989 in a job within his medical restrictions.[14] The parties have also stipulated that the Claimant reached maximum medical improvement (MMI) on December 7, 1987. Both parties further agree that since being "passed out" on May 6, 1988 from the Shipyard, the Claimant received temporary total disability payments in the amount of $441.62 per week. The Employer, relying upon *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157-159 (1989) maintains that, as a matter of law, the Claimant's now established residual wage earning capacity relates back to the date of maximum medical improvement. Moreover, the Employer maintains that even if the residual wage earning capacity did not relate back as a matter of law, the Employer has established the availability of suitable alternate jobs which the Claimant was capable of performing from May 6, 1988 until February 16, 1989. The Claimant, however, maintains that the Claimant should not now be penalized for holding off until February, 1989 before seeking and finding work. The Claimant avers that the Employer's promise to attempt to find him another job at the Shipyard caused him to delay his search. Moreover, he believes that his reliance upon and complete cooperation with Mr. DeMark's vocational rehabilitation efforts indicates his willingness to ultimately obtain a job.

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[14] The parties do not contest that from February 16, 1989 to the present and continuing, the Claimant is entitled to receive $340.28 per week as an award for permanent partial disability.

Based upon the specific facts of this case as discussed above, the Claimant may well have delayed his job search in reliance upon either the Shipyard or Mr. DeMark. However, that is simply not determinative of this issue. The Employer's argument is compelling on this issue. The subsequent employment of the Claimant absolutely settled any question of suitable alternate employment. This done, the date of permanency is the date of onset of permanent partial disability. *See Stevens, supra.* Therefore, I find that the Employer is entitled to a credit of $101.34 per week from May 6, 1988 to February 16, 1989.

Is the Claimant entitled to a temporary total disability award from January 18, 1988 through May 6, 1988?[15]

The record is clear that no sooner had the Claimant returned to work in the X-43 Department aboard the aircraft carrier on January 18, 1988, he started complaining that the daily climbing was too strenuous and violated his work restrictions. In his January 11, 1988 letter, Dr. Peach had advised against shipboard work as well as climbing ladders and steep steps. On January 18, 1988, Dr. Peach's note to the Shipyard reaffirmed this and referred specifically to steep steps aboard ship. The Claimant's continued complaints bore no further fruit until he complained to the U.S. Department of Labor. On March 4, 1988, Dr. Bobbitt finally asked for clarification from Dr. Peach about the term "steep steps". No mention was made of Dr. Peach's clarification in his January 18, 1988 note. In late

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[15] Based upon my conclusions on the previous issue, I find that since the Employer has established suitable alternate employment and the date of permanency (December 7, 1987) is the date of onset of permanent partial disability, the present issue can no longer be one of total disability since the Claimant retained some wage-earning capacity during this time period.

March Dr. Peach then clearly and unequivocally reaffirmed that steep stairs referred to the type found aboard ships. It was not until May 6, 1988, that the Claimant's duties no longer required shipboard work involving steep stair climbing. Based upon the Claimant's testimony as well as the Shipyard records and reports of Dr. Peach, I find that the Shipyard did violate the Claimant's medical restrictions and was put on notice of this fact by both the Claimant and Dr. Peach on January 18, 1988.

The Claimant maintains that notwithstanding the fact that the Claimant was working during this period, he is entitled to disability compensation. *Haughton Elevator Company v. Lewis*, 572 F.2d 447 (4th Cir. 1978). The Employer maintains that this case is inapposite since it has not been shown that the Claimant worked in excruciating pain. Moreover, the Claimant had worked 48 hours of overtime during the period. Furthermore, the Employer maintains the Claimant could have resolved the question by filing a grievance; yet he chose not to do so.

I find the most compelling evidence concerning the question of whether or not the Claimant was required to work in extreme pain, to be the testimony of the Claimant himself. I find him to be an extremely credible witness. He testified that the continuous shipboard climbing was very difficult on him and that he barely got through the work day because of it. I believe his testimony. The fact that he worked 48 hours of overtime during that period is inconsequential. He had a long history of working a lot of overtime in the past when it was available. He worked as much overtime s he could get because he needed the money (Tr. 31). This was the first time overtime was available to him in a number of years. This limited amount of overtime suggests to me an attempt by an individual to persevere through adversity. I will draw no negative inference because the Claimant worked some overtime during this time frame.

The Employer maintains that the Claimant's testimony is not credible because he could have resolved the matter by simply filing a grievance. Moreover, the Employer points out inconsistencies in the Claimant's testimony concerning whether or not a grievance was filed. I do not find that this in any way affects the credibility of the Claimant. Whether or not the Claimant chose to file a grievance in his concern. There was no requirement for him to do this. Apparently he did not get along well with his union. Nor do I find his testimony inconsistent about whether a grievance was actually initiated or not. Even Mr. Decker had a problem establishing precisely what specifically constituted the first step of filing a grievance. I'm certainly not going to discredit the Claimant's testimony because he may have only a layman's knowledge concerning the subtleties of a bargaining agreement.

Consequently, I find that the Claimant's testimony concerning the extent of his pain during the time he was worked in violation of his medical restrictions to be probative. While Dr. Peach did not specifically indicate that the Claimant was in excruciating pain during this time period, his reports do reflect the doctor's concern for the Claimant's ongoing chronic discomfort and pain caused by the shipboard climbing. Therefore, I find that Dr. Peach's reports support the Claimant's testimony rather than detract from it. Accordingly, I find that the Claimant has established entitlement to partial disability compensation notwithstanding the fact that he was working during this time period. *Haughton, supra.* The Claimant is entitled to permanent partial disability compensation of $340.28 per week from January 18, 1988 through May 6, 1988.

Is the Employer entitled to Section 8(f) relief?

Turning attention first to the requirement that the Employer demonstrate that the Employee had a pre-existing permanent, partial disability, it should be noted that this

need nc. be an economic disability, but a physical disability sufficiently serious to motivate an employer to discharge the employee due to an increased risk of an employment-related accident and increased compensation liability. *Atlantic and Gulf Stevedores, Inc. v. Director, OWCP,* 541 F.2d 602 (1976). Also, the pre-existing disability need not be employment related. However, the mere fact that the employee has suffered a prior injury does not in and of itself establish a pre-existing disability. There must be some serious lasting physical problems resulting from the injury. *Director, OWCP v. Belcher Erectors,* 770 F.2d 1220 (1985). After considering the medical evidence of record, I find that it is clear that the Claimant suffered a series of back and neck injuries beginning in 1965. The opinions of Drs. Harmon, Peach and Bobbitt leave no doubt that they believe that prior to Claimant's 1984 lumbar injury, he suffered from a pre-existing permanent partial disability. This was brought about by the Claimant's low back injuries sustained in the 1960's and 1970's, the sacral arch defect detected in 1966, and the 1984 cervical surgery. These are well reasoned decisions. Moreover, the Claimant's testimony concerning ongoing lower back and neck problems corroborates their opinions. The record is devoid of contrary probative evidence. Therefore, I find that the Employer has demonstrated that the Claimant suffered a serious pre-existing permanent partial disability.

The next question is whether the Claimant's pre-existing disability combined with his last injury and, thus, caused a greater degree of disability than that which would have resulted solely from the final injury. Again, the opinions of Drs. Harmon, Peach and Bobbitt support this proposition. Sincer there is no contrary probative evidence, I find that the Employer has met its burden of proof in establishing that the Claimant's pre-existing disability combined

with his last injury and caused a greater degree of disability than that which would have resulted solely from the final injury.

Finally, the Employer must establish that the Claimant's pre-existing disability was manifest to it. A pre-existing impairment is manifest to the Employer if the Employer knew or could have discovered the impairment prior to the most present injury. *Lowry v. Willamette Iron and Steel Co.,* 11 BRBS 372 (1979). The mere existence of records showing the impairment is sufficient. I find that the Shipyard clinic records clearly reflect the Claimant's ongoing back and neck problems form 1965 on. These conditions were clearly manifest to the Employer. I find that the Employer has established that the Claimant's pre-existing disability was manifest to it.

Therefore, the Claimant's disability is within the scope of Section 8(f) of the Act. The Employer is entitled to relief pursuant to that Section.

ORDER

1. The Employer is to pay the Claimant compensation for temporary partial disability for lost overtime at the rate of $87.83 per week from April 11, 1987 through December 7, 1987.

2. The Employer is to pay the Claimant compensation for temporary partial disability at the rate of $340.28 per week from January 18, 1988 until May 6, 1988.

3. The Employer is to pay the Claimant compensation for permanent partial disability at the rate of $340.28 per week from May 6, 1988 to the present and continuing.[16]

4. The Employer is to receive a credit from the Claimant of $101.34 per week from May 6, 1988 to February 16, 1989.

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[16] It is noted that the Employer has already complied with this.

5. Upon the expiration of 104 weeks beginning May 6, 1988, the Special Fund shall be liable for continuing payments at the same weekly rate.[17]

/s/ Daniel A. Sarno, Jr.
DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/jbm

Dated: March 28, 1990
Hampton, Virginia

[17] The Special Fund will not be penalized for the Employer's violation of the Claimant's medical restrictions from January 18, 1988 to May 6, 1988.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

The Longshore and Harbor Workers' Compensation Act, as codified at 33 U.S.C. 901 *et seq.*, provides in relevant part:

§ 921. Review of compensation orders

* * * * *

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued

unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

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(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference

thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

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§ 921a. Appearance of attorneys for Secretary, deputy commissioner, or Board

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

* * * * *

§ 939. Administration by Secretary

(a) Prescribing rules and regulations; appointing and fixing compensation of employees; making expenditures

Except as otherwise specifically provided, the Secretary

shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subsection (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chapter shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers therefor approved by the Secretary.

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(c) Furnishing information and assistance; directing vocational rehabilitation

(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

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20 C.F.R., Pts. 701, 702, 801 and 802 provide in relevant part:

§ 701.201 Establishment of Office of Workers' Compensation Programs.

The Assistant Secretary of Labor for Employment Standards, by authority vested in him or her by the Secretary of Labor in Secretary's Order No. 7-87 (52 FR 48466), established in the Employment Standards Administration (ESA) an Office of Workers' Compensation Programs (OWCP). The Assistant Secretary further designated as the head thereof a Director, who shall administer the programs assigned to that office by the Assistant Secretary.

§ 701.202 Transfer of functions.

Pursuant to the authority vested in him or her by the Secretary of Labor, the Assistant Secretary for Employment Standards transferred from the Bureau of Employees' Compensation to the Office of Workers' Compensation Programs all functions of the Department of Labor with respect to the administration of benefits programs under the following statutes:

(a) The Longshore and Harbor Workers' Compensation Act, as amended and extended, 33 U.S.C. 901 et seq.;

* * * * *

§ 702.333 Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.

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§ 801.102 Review authority.

(a) The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.;

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§ 802.410 Judicial review of Board decisions.

(a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

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